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UNITED STATES REPORTS

VOLUME 461

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1982

April 20 Through June 3, 1983

Together With Opinions of Individual Justices in Chambers

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1985

ERRATUM

428 U. S. XI, line 26: "322 U. S." should be "322 So. 2d".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the CHIEF JUSTICE be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1982

MORRIS, WARDEN *v.* SLAPPY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1095. Argued December 1, 1982—Decided April 20, 1983

When respondent was charged in California Superior Court with various crimes, including rape, robbery, and burglary, all concerning the same female victim, the court assigned the Deputy Public Defender to defend respondent. The Deputy Public Defender represented respondent at the preliminary hearing and supervised an extensive investigation. Shortly before the trial, the Deputy Public Defender was hospitalized for surgery, and six days before the scheduled trial date a senior trial attorney in the Public Defender's Office was assigned to represent respondent. After the trial was under way, respondent moved for a continuance, claiming that his newly assigned attorney did not have time to prepare the case. The attorney, however, told the court that he was fully prepared and "ready" for trial, and the court denied a continuance. Respondent was convicted on some counts but there was a mistrial on other counts on which the jury could not agree. A second trial, during which respondent refused to cooperate with his lawyer, also resulted in convictions. The California Court of Appeal affirmed the convictions on all counts, and the California Supreme Court denied review. Thereafter, respondent filed a habeas corpus petition in Federal District Court, alleging that the California Superior Court abused its discretion in denying a continuance. The District Court denied the writ. The Court of Appeals reversed, holding that the Sixth Amendment guarantees a right to counsel with whom the accused has a "meaningful attorney-client relationship," and that the state trial judge abused his discretion and violated this right by arbitrarily denying a continuance that would have permitted the Deputy Public Defender to try the case.

Held: The state trial court did not violate respondent's Sixth Amendment right to counsel by denying a continuance. Pp. 11–15.

(a) Broad discretion must be granted trial courts on matters of continuances. Here, in the face of an unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and "ready" for trial, it was far from an abuse of discretion to deny a continuance. Nor is there any merit to the claim that the denial of a continuance prevented the substituted attorney from being fully prepared for trial. Pp. 11–12.

(b) In holding that the trial judge violated respondent's right to counsel by arbitrarily refusing a continuance that would have permitted the Deputy Public Defender to try the case, the Court of Appeals misread the record and the controlling law and announced a new constitutional standard—"meaningful attorney-client relationship"—that is unsupported by any authority. The court erred in reading the record as indicating that respondent timely and in good faith moved for a continuance to permit the Deputy Public Defender to represent him. On the contrary, the record shows that the trial court was abundantly justified in denying respondent's midtrial motion for a continuance so as to have the Deputy Public Defender represent him. The Sixth Amendment does not guarantee a "meaningful relationship" between an accused and his counsel. No court could possibly guarantee that an accused will develop the kind of rapport with his attorney that the Court of Appeals thought to be part of the Sixth Amendment guarantee of counsel. Pp. 12–14.

(c) In creating a novel Sixth Amendment right to counsel with whom the accused has a "meaningful relationship," and ordering retrial, the Court of Appeals failed to take into account the interest of the victim in not undergoing the ordeal of yet a third trial. There is nothing in the record to support the conclusion that respondent was entitled to a new trial, and the District Court properly denied relief. Pp. 14–15.

649 F. 2d 718, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, in which MARSHALL, J., joined, *post*, p. 15. BLACKMUN, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 29.

Dane R. Gillette, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *George Deukmejian*, Attorney General, *Robert H. Phili-*

bosian, Chief Assistant Attorney General, *William D. Stein*, Assistant Attorney General, and *W. Eric Collins* and *Herbert F. Wilkinson*, Deputy Attorneys General.

Michael B. Bassi, by appointment of the Court, 456 U. S. 942, argued the cause and filed a brief for respondent.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether it was error for the Court of Appeals to hold that the state trial court violated respondent's Sixth Amendment right to counsel by denying respondent's motion for a continuance until the Deputy Public Defender initially assigned to defend him was available. We granted certiorari, 456 U. S. 904 (1982), and we reverse.

The issues raised arise out of two trials in the state court, the second trial having been held on two counts on which the first jury could not agree. Respondent was convicted of robbery, burglary, and false imprisonment in the first trial; he was convicted of rape and forcible oral copulation in the second. On review of all five counts, the California Court of Appeal, First Appellate District, affirmed the convictions, and the California Supreme Court denied review. Thereafter the United States District Court denied respondent's petition for a writ of habeas corpus. This denial was reversed by the United States Court of Appeals, which held that the Sixth Amendment guarantees a right to counsel with whom the accused has a "meaningful attorney-client relation-

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey*, and *Edwin S. Kneedler* for the United States; and by *Richard J. Wilson* and *Howard B. Eisenberg* for the National Legal Aid and Defender Association.

Dennis A. Fischer, Jeff Brown, Ephraim Margolin, Robert Altman, John J. Cleary, James R. Dunn, and *Terence F. MacCarthy* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

ship," and that the trial judge abused his discretion and violated this right by denying a motion for a continuance based on the substitution of appointed counsel six days before trial. 649 F. 2d 718 (CA9 1981).

I

Respondent's *pro se* petition for a writ of habeas corpus in the United States District Court set forth two grounds for relief: (a) that the state "[t]rial court abused its discretion by failing to order a substitution of counsel after [respondent and counsel became] embroiled in irreconcilable conflict," Record 3; and (b) that the trial court had not permitted him to testify in his own behalf in the second trial. *Ibid.* The facts shown by the record conclusively rebut both these claims and are alone dispositive, independent of the correctness of the novel Sixth Amendment guarantee announced by the Court of Appeals.

A

After midnight on July 7, 1976, the victim, a young woman, left her apartment to shop at a nearby grocery store in San Francisco. There she was accosted by respondent and when she complained to the store manager, he ordered respondent to leave. Respondent waited for the victim outside; when the victim left the store, respondent threw a beer bottle at her. She asked the store manager to call the police, but he told her just to walk away. She then walked home taking the long way around the block, but when she entered her apartment house, respondent was waiting for her in the lobby. From this fact, the jury could have inferred that respondent had been stalking the victim from the time she first left her apartment. Respondent forced the victim into the basement, where, she testified, he raped and sodomized her and then robbed her.

The victim managed to escape from respondent and fled from the building into a nearby all-night diner, where she was sheltered until the police came. She gave the police a description of her assailant; he was apprehended two blocks away. He was wearing the green fatigue jacket with fur-trimmed hood and the "Afro" style wig that the victim had described to the police. On his person the police found jewelry taken from the victim. The respondent told the booking officer that he had been given the jewelry by a woman whose last name he did not recall and whose address he did not know. Police found the victim's clothing scattered on the floor of the basement of her apartment building and a button from respondent's jacket on the basement steps.

Respondent was charged in San Francisco Superior Court with five felonies.[1] The court appointed the San Francisco Public Defender's Office to represent respondent and Deputy Public Defender Harvey Goldfine was assigned to defend the accused. Goldfine represented respondent at the preliminary hearing and supervised an extensive investigation. The trial was scheduled for Thursday, September 23, 1976. Shortly prior to trial, however, Goldfine was hospitalized for emergency surgery. On Friday, September 17, six days before the scheduled trial date, the Public Defender assigned Bruce Hotchkiss, a senior trial attorney in the Public Defender's Office, to represent respondent.

On the day he was assigned the case, Hotchkiss interviewed respondent in jail and advised him of the substitution. Between that date and the following Tuesday, September 21, Hotchkiss reviewed the files and investigation prepared by his colleague. On Tuesday, he conferred with respondent for three hours; on the following day he again met with respondent in the morning and afternoon.

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[1] Respondent was charged with rape, Cal. Penal Code Ann. § 261, subd. 3 (West 1970); forcible oral copulation, Cal. Penal Code Ann. § 288a (West 1970); second-degree burglary, Cal. Penal Code Ann. § 459 (West 1970); second-degree robbery, Cal. Penal Code Ann. § 211a (West 1970); and false imprisonment, Cal. Penal Code Ann. § 236 (West 1970).

(a) *First Day of First Trial*

The first trial began as scheduled on Thursday, September 23. At the opening of trial, respondent told the court: "I only have this P. D. [Public Defender] for a day and a half, we have not had time to prepare this case. He came in Tuesday night, last Tuesday night was the first time I saw him. . . . We have not had enough time to prepare this case." App. 7.

Construing respondent's remarks as a motion for a continuance, the court denied the motion, noting that the case had been assigned to Hotchkiss the previous Friday, six days before the trial date, and that Hotchkiss stated he had "investigated the case, [and] studied it." *Id.*, at 8. In reply, respondent repeated his claim that Hotchkiss had only been on the case for a day and a half.

Respondent then stated:

> "[T]his past Tuesday was the first time [Hotchkiss interviewed me.] He said he was busy and he couldn't make it up there. He only *[sic]* been on this case one day and a half your Honor, he can't possibly have had enough time to investigate all these things in this case. Some of the major issues have not been investigated. It's impossible for him to have time enough to take care of this case to represent this case properly, the way it should be represented." *Ibid.*

Hotchkiss explained Goldfine's absence and stated that he was prepared to try the case on the basis of his study of the investigation made by Goldfine and his conferences with respondent. "I feel that I am prepared. My own feeling is that a further continuance would not benefit me in presenting the case." *Id.*, at 11. Respondent replied that he was "*satisfied with the Public Defender*, but it's just no way, no possible way, that he has had enough time to prepare this case." *Id.*, at 12 (emphasis added).

The trial judge repeated that he was confident that the Public Defender's Office was representing respondent adequately and that Hotchkiss was an experienced counsel; the court again denied a continuance. *Id.*, at 9.

(b) *Second Day of First Trial*

At the start of the second day of trial, on Friday, September 24, 1976, respondent again complained that Hotchkiss was not prepared. When the court expressed its confidence in Hotchkiss, respondent said:

> "I don't mean he's not a good P. D., *I don't have anything against him.* It's just that he didn't have time to prepare the case, one day and a half." *Id.*, at 18 (emphasis added).

The trial judge again stated that he was satisfied that the case had been "well prepared" by Goldfine, and that Hotchkiss had been assigned to the case the previous week, had read the transcript of the preliminary hearing, and had "prepared the case, reviewed all the matters, obtained the pictures, and other items that he intends to produce into evidence." *Ibid.* In conclusion, the trial judge stated: "I am satisfied . . . that Mr. Hotchkiss is doing a more than adequate job, a very fine job." *Id.*, at 18–19.

When respondent continued to complain that Hotchkiss had not adequately investigated the case, Hotchkiss told the court:

> "My feeling is that all investigation that needed to be done and that should be done and quite possibly that could have been done has been done." *Id.*, at 21–22.

Finally, Hotchkiss pointed out that he would have the weekend between the close of the prosecution's case and the beginning of the defense's case for further conferences with respondent. *Id.*, at 22–23.

At this time—on the second day of the first trial—respondent first mentioned Goldfine's name. After complaining again about Hotchkiss' alleged lack of time for preparation, respondent said: "Mr. Harvey Goldfine was my attorney, he was my attorney, and he still is. I haven't seen him in five weeks because he's in the hospital." *Id.*, at 24. Respondent then claimed that not even Goldfine had had enough time to prepare the case: "Mr. Harvey Goldfine didn't even have enough time to go over my case with me, he didn't even have time." *Ibid.* Respondent concluded these remarks with additional complaints about Hotchkiss' preparation.

(c) *Third Day of First Trial*

Trial resumed four days later, on Tuesday, September 28, 1976. Out of the presence of the jury, respondent presented the court with a *pro se* petition for a writ of habeas corpus, claiming that he was unrepresented by counsel. In support of his petition, respondent claimed that Goldfine, not Hotchkiss, was his attorney. Specifically, he said that the writ should be granted on

> "the grounds that my attorney's in the hospital, and I don't legally have no attorney, and this P. D. here told me, this P. D., Mr. Hotchkiss, Bruce Hotchkiss, *told me I didn't have no defense to my charges.*" *Id.*, at 29 (emphasis added).

Hotchkiss disputed this charge. The trial court treated the petition as a renewal of respondent's motion for a continuance, and denied it.

Following the court's ruling, respondent announced that he would not cooperate at all in the trial and asked to be returned to his cell. The court urged respondent to cooperate but respondent refused, claiming that Hotchkiss did not represent him: "I don't have any Counsel, I just got through telling you, I don't have no Counsel." *Id.*, at 32. However, respondent remained in the courtroom and the trial proceeded.

Later, respondent renewed his attack:

> "What do I have to say to get through to you, your Honor, what do I have to say to make you understand. I have told you two or three times, and then you keep telling me about talking to my Counsel. I don't have

> no attorney, I told you I don't have no attorney. My attorney's name is Mr. P. D. Goldfine, Harvey Goldfine, that's my attorney, he's in the hospital." *Id.*, at 37–38.

Ultimately, respondent refused to take the stand, ignoring Hotchkiss' advice that he testify. The jury returned a verdict of guilty on the robbery, burglary, and false imprisonment counts, but failed to reach a verdict on the rape and oral copulation counts.

(d) *Second Trial*

A week later, a second trial was held on the charges left unresolved as a result of the mistrial and Hotchkiss again appeared for respondent. Once more, respondent ignored Hotchkiss' advice and refused to take the stand.[2] Indeed, respondent refused to cooperate with or even speak to Hotchkiss. The second jury returned a guilty verdict on the sexual assault counts. The California Court of Appeal affirmed respondent's convictions on all five counts; the California Supreme Court denied review.

B

The United States District Court for the Northern District of California (Peckham, J.) construed the *pro se* petition for a writ of habeas corpus liberally as including a claim that the trial court abused its discretion both in denying a continuance to allow Hotchkiss additional time to prepare and in denying a continuance to permit Goldfine to defend respondent. In denying the writ, the District Court stated:

> "The record supports the trial judge's conclusion that Hotchkiss had adequate time to prepare for the trials

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[2] After the jury had been charged, but before it had retired to begin deliberations, respondent asked the judge in open court to permit him to take the stand and testify. A chambers conference was then held, at which the judge denied respondent's motion to testify, concluding it had been made in bad faith: "I am denying it because I am not convinced. All you're trying to do is make a record for appeal . . . ." App. 52.

> and that he presented an able defense despite [respondent's] lack of cooperation with him." App. to Pet. for Cert. D3–D4.

The District Court also rejected respondent's claim that the trial court should have granted the continuance to permit Goldfine to represent respondent, stating that

> "it was not unreasonable to conclude that the efficient administration of justice required that petitioner be represented by Hotchkiss rather than Goldfine after the latter had fully recovered from surgery." *Id.*, at D4–D5.

The District Court thus rejected any claim that the state trial judge had abused his discretion in denying a continuance.[1]

In reversing the District Court's denial of the writ, the Court of Appeals acknowledged that "an indigent defendant does not have an unqualified right to the appointment of counsel of his own choosing," but argued that respondent was not seeking appointment of counsel of his own choosing; rather, he "was merely seeking a continuance of the trial date so that his attorney [Goldfine] would be able to represent him at trial." 649 F. 2d, at 720.

The Court of Appeals went on to announce a new component of the Sixth Amendment right to counsel. The Sixth Amendment right, it held, would

> "be without substance *if it did not include the right to a meaningful attorney-client relationship.*" *Ibid.* (emphasis added).

The court seems to have determined, solely on the basis of respondent's confusing and contradictory remarks on the subject, that respondent had developed such a "meaningful attorney-client relationship" with Goldfine but not with Hotchkiss.

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[1] The District Court also rejected the claim that the trial judge had abused his discretion in denying respondent the opportunity to testify after the jury had already been charged in the second trial.

The Court of Appeals next stated that the trial court, having failed to inquire about the probable length of Goldfine's absence, could not have weighed respondent's interest in continued representation by Goldfine against the State's interest in proceeding with the scheduled trial. The Court of Appeals concluded that the trial court's failure to conduct this balancing test ignored respondent's Sixth Amendment right to a "meaningful attorney-client relationship" and hence violated respondent's right to counsel;[4] this violation was held to require reversal without any need to show prejudice. The Court of Appeals directed that the writ issue unless respondent received a new trial on all five counts.

II

Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. See *Chambers* v. *Maroney*, 399 U. S. 42, 53–54 (1970). Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. *Ungar* v. *Sarafite*, 376 U. S. 575, 589 (1964).

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[4] The Court of Appeals undertook to confine its holding to cases where the defendant requests a continuance in good faith. Here, the court asserted: "The record clearly demonstrates the sincerity of Slappy's desire to be represented by Goldfine, and the state has not contended that Slappy was acting in bad faith. . . . [T]here is nothing in the record from which it can be inferred that Slappy's request for a continuance was motivated by a desire to delay his trial for an improper purpose." 649 F. 2d, at 722. Nothing in the record affords any support for these "findings" of the Court of Appeals. By contrast, the State asserts that it has "always contended that Slappy was acting in bad faith when he demanded that Goldfine rather than Hotchkiss represent him." Brief for Petitioner 38, n. 23.

We have set out at greater length than usual the record facts showing Hotchkiss' prompt action in taking Goldfine's place, his prompt study of the investigation, his careful review of the materials prepared by Goldfine for trial, his conferences with respondent, and his representation to the court that "a further continuance would not benefit me in presenting the case," App. 11. In the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and "ready" for trial, it was far from an abuse of discretion to deny a continuance. On this record, it would have been remarkable had the trial court not accepted counsel's assurances.

Nor is there any merit to the claim that the denial of a continuance prevented Hotchkiss from being fully prepared for trial. Despite respondent's adamant—even contumacious—refusal to cooperate with Hotchkiss or to take the stand as Hotchkiss advised, in spite of respondent's numerous outbursts and disruptions, and in the face of overwhelming evidence of guilt, Hotchkiss succeeded in getting a "hung jury" on the two most serious charges at the first trial. Given the undisputed and overwhelming evidence of guilt, the jury's failure at the first trial to convict the defendant on the more serious charges cannot reflect other than favorably on Hotchkiss' readiness for trial.

III

In holding that the trial judge violated respondent's right to the assistance of counsel by arbitrarily refusing a continuance that would have permitted Goldfine to try the case, the Court of Appeals misread the record and the controlling law and announced a new constitutional standard which is unsupported by any authority.

A

The Court of Appeals' first error was in reading the record as indicating that respondent timely and in good faith moved for a delay to permit Goldfine to continue to represent him. The transcript clearly shows that respondent did not specifically assert a concern for continued representation by Goldfine until the third day of trial, 11 days after Hotchkiss had been substituted for Goldfine. Until then, all that respondent sought was a delay to give Hotchkiss additional time that respondent, but not Hotchkiss, thought necessary to prepare for trial. Moreover, respondent specifically disavowed any dissatisfaction with counsel; he informed the court on the first day of trial that he was "satisfied" with Hotchkiss. *Id.*, at 12. On this record, we cannot fathom how the Court of Appeals could have construed these complaints about Hotchkiss' alleged lack of time in which to prepare as indicating an unspoken preference for Goldfine.

On the contrary, the trial court was abundantly justified in denying respondent's midtrial motion for a continuance so as to have Goldfine represent him. On this record, it could reasonably have concluded that respondent's belated requests to be represented by Goldfine were not made in good faith but were a transparent ploy for delay. In our view, the record shows that the trial judge exhibited sensitive concern for the rights of the accused and extraordinary patience with a contumacious litigant.[5]

B

The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a *meaningful attorney-client relationship*," 649 F. 2d, at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.[6]

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[5] Nor did the trial court abuse its discretion in denying respondent's motion to testify in the second trial after closing argument had been made and after the jury had been instructed.

IV

We have gone to unusual length in discussing the facts and relevant authorities in order to evaluate the claim of abuse of discretion by the trial judge and to deal with the novel idea that the Sixth Amendment guarantees an accused a "meaningful attorney-client relationship." Had the Court of Appeals examined the record more carefully, it would have had no occasion to consider, let alone announce, a new constitutional rule under the Sixth Amendment.

In its haste to create a novel Sixth Amendment right, the court wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

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[6] The Court of Appeals seems to have believed that an appointed counsel with whom the accused did not have a "meaningful relationship" was the equivalent of no counsel; as a consequence, it held that no prejudice need be shown for violations of the right to a "meaningful" attorney-client relationship. Our holding that there is no Sixth Amendment right to a "meaningful attorney-client relationship" disposes of that argument.

Over 75 years ago, Roscoe Pound condemned American courts for ignoring "substantive law and justice," and treating trials as sporting contests in which the "inquiry is, Have the rules of the game been carried out strictly?" Pound, The Causes of Popular Dissatisfaction With the Administration of Justice, 29 ABA Ann. Rep. 395, 406 (1906). A criminal trial is not a "game," and nothing in the record of respondent's two trials gives any support for the conclusion that he was constitutionally entitled to a new trial. The state courts provided respondent a fair trial, and the United States District Judge properly denied relief.

The judgment of the Court of Appeals is reversed, and the case is remanded with directions to reinstate the judgment of the District Court.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the result.

The Court states that "[i]n its haste to create a novel Sixth Amendment right, the [Court of Appeals] wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case." *Ante*, at 14. Unfortunately, it could just as easily be said of the Court that in its haste to "deal with the novel idea that the Sixth Amendment guarantees an accused a 'meaningful attorney-client relationship,'" *ibid.*, the Court reaches issues unnecessary to its judgment, mischaracterizes the Court of Appeals' opinion, and disregards the crucial role of a defendant's right to counsel in our system of criminal justice. For the reasons described below, I concur only in the Court's reversal of the Court of Appeals' judgment.

I

After reviewing the record of the proceedings in the state trial court, the Court of Appeals concluded that respondent moved for a continuance based on the unavailability of Harvey Goldfine, the Deputy Public Defender originally appointed to represent him. 649 F. 2d 718, 719–720 (CA9 1981). The court, therefore, proceeded to consider whether the trial court had denied respondent's Sixth Amendment right to counsel by refusing to grant his motion for a continuance until Goldfine was well enough to represent him at trial. *Id.*, at 720. In considering this question, the Court of Appeals acknowledged that "an indigent defendant does not have an unqualified right to the appointment of counsel of his own choosing." *Ibid.* The court stated, however, that after a particular attorney is appointed to represent a defendant, the defendant and his attorney develop a relationship that is encompassed by the Sixth Amendment right to counsel. *Ibid.* In the court's view, the attorney-client relationship is important to a defendant's Sixth Amendment right to counsel because it affects the quality of representation and the defendant's ability to present an effective defense. *Id.*, at 720–721. In this regard, the court noted that unreasonable denials of continuances when a defendant has retained counsel can amount to a denial of the right to counsel or to a violation of due process. *Id.*, at 721. The court saw no reason "to distinguish between appointed and retained counsel in the context of preserving an attorney-client relationship." *Ibid.*

In light of "the importance of the attorney-client relationship to the substance of the defendant's sixth amendment right to counsel," the court held that "the sixth amendment (as incorporated by the fourteenth amendment) encompasses the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance founded on the temporary unavailability of a defendant's particular attorney." *Ibid.* The court stated that in considering motions for continuances based on the temporary unavailability of counsel, "the trial court must balance the defendant's constitutional right to counsel against the societal interest in the 'prompt and efficient administration of justice.'" *Ibid.* (citation omitted). In this case, the trial judge failed to inquire into the expected length of Goldfine's unavailability and, therefore, could not "engage in the balancing required to protect [respondent's] rights." *Id.*, at 722. As a result, respondent had been denied his right to counsel as that right was construed by the Court of Appeals. *Ibid.*[1]

The Court of Appeals next concluded that no showing of prejudice was required for reversal of the conviction. *Ibid.* In reaching this conclusion, the court stated that this case did not involve a claim of ineffective assistance of counsel, which it previously had held to require a showing of prejudice to justify reversal. *Id.*, at 722, and n. 4. Instead, the court analogized this case to cases in which counsel is either not provided or in which counsel is prevented from fulfilling normal functions. *Id.*, at 723. In such cases a defendant is not required to demonstrate prejudice. *Ibid.*[2]

II

I agree with the Court that the Court of Appeals misread the record in concluding, at least implicitly, that respondent made a timely motion for a continuance based on Goldfine's unavailability and on his desire to have Goldfine represent him at trial. *Ante*, at 12–13.[3]

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[1] The Court of Appeals stated that there was "nothing in the record from which it [could] be inferred that [respondent's] request for a continuance was motivated by a desire to delay his trial for an improper purpose." 649 F. 2d, at 722. The court, therefore, found it unnecessary to reach the question of whether the "same result would obtain if it were shown that the defendant's request for a continuance was made in bad faith." *Ibid.*

[2] The court limited its holding to cases in which "a trial court does not attempt to ascertain the length of continuance necessary to insure counsel's presence at trial, and the attorney with whom the defendant has an attorney-client relationship does not appear at trial . . . ." *Id.*, at 723.

Respondent based his initial motion for a continuance on the ground that Hotchkiss had not had enough time to prepare the case. App. 7–13. On the second day of trial, respondent again complained that Hotchkiss had not had enough time to prepare. *Id.*, at 17. For the first time respondent also mentioned Goldfine and stated that Goldfine "was [his] attorney." *Id.*, at 24. Respondent went on to state that he had not seen Goldfine in five weeks because Goldfine was in the hospital. *Ibid.* Respondent suggested, however, that Goldfine "didn't even have time enough to go over my case with me, he didn't even have time." *Ibid.* It is clear, therefore, that respondent was basing his inartful motions for a continuance on the inadequate preparation of his appointed counsel. Even construing respondent's statements liberally, as a court should, there is no way the trial judge reasonably could have understood that respondent's motions for a continuance were based on Goldfine's unavailability and on respondent's desire to be represented by him. Based on Hotchkiss' assurances that he was prepared, *id.*, at 10–11; see *id.*, at 21–23, the trial judge clearly did not abuse his discretion in denying a continuance.

On the third day of trial, following an intervening weekend, respondent filed a "Writ of Habeas Corpus" with the trial court. *Id.*, at 28. He stated that the writ was based, in part, on the ground that his attorney was in the hospital and that he did not "legally have [an] attorney." *Id.*, at 29. During his discussion with the trial judge, respondent repeatedly stated that he did not have an attorney and that his attorney was in the hospital. See *id.*, at 32, 38, 41. At this point, the trial judge reasonably could be expected to have understood that respondent was moving for a continuance based on Goldfine's unavailability and on his desire to be represented by Goldfine. As the Court points out, however, respondent finally made clear the grounds for his motions 11 days after Hotchkiss had been substituted for Goldfine, *ante*, at 13, and 5 days after the trial had begun. I agree with the Court that the trial judge was justified "in denying respondent's midtrial motion for a continuance. . . ." *Ibid.* See *Ungar* v. *Sarafite*, 376 U. S. 575, 588–591 (1964).

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[3] Unlike the Court, *ante*, at 13, I find no need to reach the issue of respondent's good faith in moving for a continuance. I also do not endorse the Court's gratuitous disagreement, *ante*, at 11, n. 4, with the Court of Appeals' statement that there was "nothing in the record from which it [could] be inferred that [respondent's] request for a continuance was motivated by a desire to delay his trial for an improper purpose." 649 F. 2d, at 722.

Because respondent did not make a timely motion for a continuance based on Goldfine's unavailability, I concur in the Court's reversal of the Court of Appeals' judgment. We need go no further to support a reversal. The Court recognizes as much when it states that "[t]he facts shown by the record conclusively rebut [respondent's] claims and are alone dispositive, independent of the correctness of the novel Sixth Amendment guarantee announced by the Court of Appeals." *Ante*, at 4. See also *ante*, at 14.

III

Despite the Court's recognition that it is unnecessary to its decision, the Court rejects summarily "the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." *Ibid.* (footnote omitted). The Court states simply that the Court of Appeals cited no authority "for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be." *Ante*, at 13. In the Court's view, "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel." *Ante*, at 13–14. This is the extent of the Court's analysis. Properly understood, however, the interest recognized by the Court of Appeals does find support in other cases and does not require any court to guarantee that a defendant develop a rapport with his attorney.

A

We have recognized repeatedly the central role of the defendant's right to counsel in our criminal justice system. See, *e. g., Holloway* v. *Arkansas*, 435 U. S. 475 (1978); *Geders* v. *United States*, 425 U. S. 80 (1976); *Herring* v. *New York*, 422 U. S. 853 (1975); *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Chandler* v. *Fretag*, 348 U. S. 3 (1954); *Glasser* v. *United States*, 315 U. S. 60 (1942); *Powell* v. *Alabama*, 287 U. S. 45 (1932). We have described this right as "fundamental," *Gideon* v. *Wainwright, supra*, at 344, and have stated that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." *Argersinger* v. *Hamlin, supra*, at 31. In *Powell* v. *Alabama, supra*, the Court stated:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.*, at 68–69.

Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has an interest in his relationship with his attorney. As we noted in *Faretta* v. *California*, 422 U. S. 806, 834 (1975), "[t]he right to defend is personal." It is the defendant's interests, and freedom, which are at stake. Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. This may require the defendant to disclose embarrassing and intimate information to his attorney. In view of the importance of uninhibited communication between a defendant and his attorney, attorney-client communications generally are privileged. See *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981). Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence.[4]

In recognition of the importance of a defendant's relationship with his attorney, appellate courts have found constitutional violations when a trial court has denied a continuance that was sought so that an attorney retained by the defendant could represent him at trial.

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[4] The American Bar Association Standards for Criminal Justice state that "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." ABA Standards for Criminal Justice 4–3.1(a) (2d ed. 1980) (hereinafter ABA Standards). The Standards also suggest that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." *Id.*, at 4·29 (commentary).

In *Linton* v. *Perini*, 656 F. 2d 207 (CA6 1981), the court stated that "[b]asic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel." *Id.*, at 212. Similarly, in *Lee* v. *United States*, 98 U. S. App. D. C. 272, 235 F. 2d 219 (1956), the court stated that "'[t]he relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously.'" *Id.*, at 274, n. 5, 235 F. 2d, at 221, n. 5 (citation omitted).

In *Releford* v. *United States*, 288 F. 2d 298 (CA9 1961), the attorney retained by the defendant was hospitalized. Instead of granting a continuance so that either the retained attorney could represent the defendant at trial or the defendant could secure substitute counsel of his choice, the trial judge ordered another attorney to represent the defendant over the defendant's objections and in the face of the second attorney's reluctance. *Id.*, at 299–301. The Court of Appeals reversed the defendant's conviction because the defendant had been deprived of the assistance of counsel of his own choice. *Id.*, at 301–302.

In *Gandy* v. *Alabama*, 569 F. 2d 1318 (CA5 1978), the Court of Appeals found that the defendant had been denied due process when the state trial court denied a continuance and forced the defendant to go to trial with an attorney other than the one he had retained. In the court's view, "the trial was rendered fundamentally unfair when [the defendant] was effectively denied his right to choose his counsel." *Id.*, at 1327. See also *Linton* v. *Perini*, 656 F. 2d 207, 209–211 (CA6 1981); *United States* v. *Seale*, 461 F. 2d 345, 356–361 (CA7 1972); *Lee* v. *United States*, 98 U. S. App. D. C. 272, 274, 235 F. 2d 219, 221 (1956). Cf. *United States* v. *Burton*, 189 U. S. App. D. C. 327, 330–334, 584 F. 2d 485, 488–492 (1978); *Giacalone* v. *Lucas*, 445 F. 2d 1238, 1240 (CA6 1971).

Admittedly, the cases discussed above involved retained rather than appointed counsel. This ground of distinction, however, is not sufficient to preclude recognition of an indigent defendant's interest in continued representation by a particular attorney who has been appointed to represent him and with whom the defendant has developed a relationship. Nothing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants. As was stated in a different context in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19 (plurality opinion). Undoubtedly, we must accept the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy. But where an indigent defendant wants to preserve a relationship he has developed with counsel already appointed by the court, I can perceive no rational or fair basis for failing at least to consider this interest in determining whether continued representation is possible.[5]

In *Smith* v. *Superior Court*, 68 Cal. 2d 547, 440 P. 2d 65 (1968), the California Supreme Court considered a petition for a writ of mandate to compel the trial court to vacate its order removing the defendant's attorney in a pending murder trial. The court found that the trial court had no power to remove a court-appointed attorney over the objections of the defendant and the attorney even if the decision to remove the attorney was based on doubts about the attorney's competence. *Id.*, at 562, 440 P. 2d, at 75. In reaching this conclusion, the court rejected the argument that because an indigent defendant does not pay for his attorney he has no cause to complain about the attorney's removal as long as the attorney currently handling his case is competent. It stated:

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[5] It is arguable that cases like *Releford* v. *United States*, 288 F. 2d 298 (CA9 1961), and *Gandy* v. *Alabama*, 569 F. 2d 1318 (CA5 1978), are also distinguishable from this one on the ground that they turn largely on a non-indigent defendant's right to choose his own counsel, a right that indigent defendants do not enjoy. But the considerations that may preclude recognition of an indigent defendant's right to choose his own counsel, such as the State's interest in economy and efficiency, see generally Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan. L. Rev. 73 (1974), should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence. To recognize this interest and to afford it some protection is not necessarily to afford it absolute protection. If a particular jurisdiction has sufficiently important interests, such as the structure of its public defender's office, which make continued representation by a particular attorney impractical, the trial judge may take this into account in balancing the defendant's interest in continued representation against the public's interests. The fact that such interests might exist in some jurisdictions, however, is not a sufficient reason to refuse to recognize that an indigent defendant has an important interest in a relationship that he might develop with his appointed attorney. There is no need to decide on this record which state interests might be sufficient to overcome an indigent defendant's interest in continued representation by a particular attorney with whom he has developed a relationship.

> "But the attorney-client relationship is not that elementary: it involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service. . . . It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused." *Id.*, at 561–562, 440 P. 2d, at 74 (footnote omitted).[6]

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[6] See also *Harling* v. *United States*, 387 A. 2d 1101 (D. C. 1978). The American Bar Association Standards for Criminal Justice state that "[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings." ABA Standards 5–5.2. The Standards also suggest that continuity of representation "affords the best opportunity for the development of a close and confidential attorney-client relationship," *id.*, at 5·54 (commentary), and reject public defender programs in which "stage" or "horizontal" representation is used. *Ibid.* Finally, the Standards state: "Representation of an accused establishes an inviolable attorney-client relationship. Removal of counsel from representation of an accused therefore should not occur over the objection of the attorney and the client." *Id.*, at 5–5.3. Based on the case law, the Standards

In light of the importance of a defendant's relationship with his attorney to his Sixth Amendment right to counsel, recognizing a qualified right to continue that relationship is eminently sensible. The Court of Appeals simply held that where a defendant expresses a desire to continue to be represented by counsel who already has been appointed for him by moving for a continuance until that attorney again will be available, the trial judge has an obligation to inquire into the length of counsel's expected unavailability and to balance the defendant's interest against the public's interest in the efficient and expeditious administration of criminal justice. Contrary to the Court's suggestion, *ante*, at 13–14, this does not require a trial court "to guarantee" attorney-defendant "rapport." The defendant's expressed desire in continued representation by a particular attorney is a clear indication that an attorney-client relationship has developed. The quality of that relationship, or the reasons that it developed, are of no concern to the court. The trial court's only duty is to inquire into the expected length of the attorney's unavailability and to determine whether the existing attorney-client relationship can be preserved consistent with society's interests. This is a minimal burden. It is one that we should readily impose in order to insure that a defendant's rights are not arbitrarily denied.

The defendant's interest in preserving his relationship with a particular attorney is not afforded absolute protection. If the attorney is likely to be unavailable for an extended period, or if other factors exist that tip the balance in favor of proceeding in spite of a particular attorney's absence,[7] the

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go on to suggest that "[t]o hold that counsel can be removed from the case of an impecunious defendant regardless of objection from the client and attorney is to subject such an accused to unjustified discrimination based solely on poverty." *Id.*, at 5·58 (commentary). It is clear that the Standards recognize the importance of the attorney-client relationship to a defendant's right to counsel.

[7] See n. 5, *supra*.

defendant's motion for a continuance clearly may be denied. Such denials would be subject to review under the traditional "abuse of discretion" standard. As the Court of Appeals suggested, however, the balancing is critical. 649 F. 2d, at 722, n. 3. In the absence of a balancing inquiry a trial court cannot discharge its "duty to preserve the fundamental rights of an accused." *Glasser* v. *United States*, 315 U. S., at 72.

B

After concluding that respondent had been denied his Sixth Amendment right to counsel, the Court of Appeals proceeded to consider whether a showing of prejudice was necessary to support the issuance of a writ of habeas corpus. 649 F. 2d, at 722. The Court of Appeals held that it was not. *Ibid.*[9] In reaching this conclusion, the court stated that claims of ineffective assistance of counsel, which involve specific acts and omissions of counsel, require a showing that the defendant was prejudiced by counsel's conduct before relief will be granted. *Ibid.* This case, however, did not involve an ineffective-assistance claim. *Id.*, at 722, n. 4. The claim in this case was based on the trial court's arbitrary deprivation of respondent's interest in continued representation by a particular attorney. This deprivation prevented "counsel from fulfilling normal functions—from forming and exploiting an attorney-client relationship with [respondent]." *Ibid.* As a result, the court found that this case was analogous to cases such as *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), *Geders* v. *United States*, 425 U. S. 80 (1976), *Herring* v. *New York*, 422 U. S. 853 (1975), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), *Glasser* v. *United States*, *supra*, and *Powell* v. *Alabama*, 287 U. S. 45 (1932), in which counsel either was not provided or was prevented from discharging his normal functions and in which no showing of prejudice was required. 649 F. 2d, at 723.

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[9] In view of its "holding" that "there is no Sixth Amendment right to a 'meaningful attorney-client relationship,'" the Court does not reach the prejudice question. *Ante*, at 14, n. 6.

I find the Court of Appeals' reasoning persuasive. The same conclusion has been reached in other cases in similar contexts. See, *e. g.*, *Linton* v. *Perini*, 656 F. 2d, at 211–212; *Releford* v. *United States*, 288 F. 2d, at 302; *Harling* v. *United States*, 387 A. 2d 1101, 1106 (D.C. 1978). If an ineffective-assistance-of-counsel claim were at issue here, I might agree that a showing of prejudice was required. Requiring such a showing to support ineffective-assistance claims may be appropriate because courts are able to assess an attorney's performance and the effect of that performance on a defendant's rights based on the records before them. The courts, therefore, can make reasonable judgments regarding the presence or absence of prejudice. In cases involving claims such as the one at issue here, however, courts cannot make the same judgments. The fact that a defendant has been arbitrarily denied his interest in preserving his relationship with a particular attorney, with the result that the attorney does not appear, means that there is no record on which to base judgments regarding prejudice. We recognized this problem in *Holloway* v. *Arkansas*, *supra*, in the context of joint representation of conflicting interests. We stated:

> "[I]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry

> into a claim of harmless error here would require, unlike most cases, unguided speculation." *Id.*, at 490–491 (emphasis in original).

In this case, there is no way to know whether the character of the proceedings would have changed, whether counsel would have made different decisions, or whether the defense strategy would have been different if Goldfine had represented respondent. Conclusions based on inquiries into such questions would amount to nothing more than "unguided speculation." Under these circumstances, it is reasonable and just not to require a showing of prejudice.[9]

IV

While the Court of Appeals may have misread the record, its opinion reflects a thoughtful and dedicated effort to protect the rights of an indigent criminal defendant. Despite their poverty and the fact that they stand accused of a crime, indigent defendants are entitled to the enforcement of procedural rules that protect substantive rights guaranteed by the Constitution.[10] The Court of Appeals should be commended, not criticized, for carrying out its obligation to respect this entitlement.

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[9] There is a difference between a requirement that a defendant suffer some prejudice and a requirement that he show some specific prejudice. In this case the claim is that respondent was deprived arbitrarily of his interest in continued representation by an attorney with whom he had developed a relationship. That attorney did not represent respondent at trial. In this light, and in light of the factors discussed above, it is reasonable to assume that a trial court's arbitrary denial of a continuance produces some prejudice to the defense without requiring a specific showing of prejudice.

I would qualify the Court of Appeals' analysis in one respect. If a State could show that a defendant's attorney would have been unavailable for an extended period or that other factors existed which would have made denial of a continuance reasonable, then a trial court's failure to inquire into the length of the attorney's expected unavailability and to engage in the necessary balancing would be rendered harmless. Under these circumstances, relief should not be granted. It would no longer be reasonable to assume that the defendant had been prejudiced.

[10] Although the Court acknowledges that "inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, concurring in the judgment.

The narrow question before the Court is whether the state trial judge should have inquired about the probable length of attorney Goldfine's incapacitation in order to balance respondent's right to counsel against society's interest in the prompt and efficient administration of justice. I agree with the Court that the Court of Appeals erred in construing respondent's complaints on the first day of trial as indicating a desire to be represented by Goldfine. Absent a timely request by respondent to postpone the trial until Goldfine recovered from his illness, the state trial judge had no reason to inquire into the likely length of Goldfine's unavailability. For this reason, I concur in the Court's reversal of the judgment of the Court of Appeals.

I also agree with the Court that, "[h]ad the Court of Appeals examined the record more carefully, it would have had no occasion to consider, let alone announce, a new constitutional rule under the Sixth Amendment." *Ante*, at 14. It seems to me, however, that this Court, after examining the record carefully and finding it "dispositive," *ante*, at 4, similarly has "no occasion to consider" the Sixth Amendment issue. Accordingly, I find the Court's rather broad-ranging dicta about the right to counsel and the concerns of victims (deserving of sympathy as they may be) to be unnecessary in this case.

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an accused," *ante*, at 14, it nonetheless appears to suggest that the interests of a victim in a particular case should be considered by courts in determining whether to enforce the established rights of a criminal defendant. *Ante*, at 14–15. Such a suggestion finds no support in our cases.

SMITH *v.* WADE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1196. Argued November 10, 1982—Decided April 20, 1983

Respondent, while an inmate in a Missouri reformatory for youthful first offenders, was harassed, beaten, and sexually assaulted by his cellmates. He brought suit under 42 U. S. C. § 1983 in Federal District Court against petitioner, a guard at the reformatory, and others, alleging that his Eighth Amendment rights had been violated. Because of petitioner's qualified immunity, as a prison guard, from § 1983 liability, the trial judge instructed the jury that respondent could recover only if petitioner was guilty of "gross negligence" or "egregious failure to protect" respondent. The judge also charged the jury that it could award punitive damages in addition to actual damages if petitioner's conduct was shown to be "a reckless or callous disregard of, or indifference to, the rights or safety of others." The District Court entered judgment on a verdict finding petitioner liable and awarding both compensatory and punitive damages. The Court of Appeals affirmed.

Held:

1. Punitive damages are available in a proper case under § 1983. While there is little in the legislative history of § 1 of the Civil Rights Act of 1871 (from which § 1983 is derived) concerning the damages recoverable for the tort liability created by the statute, the availability of punitive damages was accepted as settled law by nearly all state and federal courts at the time of enactment. Moreover, this Court has rested decisions on related issues on the premise that punitive damages are available under § 1983. Pp. 34–38.

2. A jury may be permitted to assess punitive damages in a § 1983 action when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent. The common law, both in 1871 and now, allows recovery of punitive damages in tort cases not only for actual malicious intent, but also for reckless indifference to the rights of others. Neither the policies nor the purposes of § 1983 require a departure from the common-law rule. Petitioner's contention that an actual-intent standard is preferable to a recklessness standard because it is less vague, and would more readily serve the purpose of deterrence of future egregious conduct, is unpersuasive. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323. Pp. 38–51.

3. The threshold standard for allowing punitive damages for reckless or callous indifference applies even in a case, such as here, where the underlying standard of liability for compensatory damages is also one of recklessness. There is no merit to petitioner's contention that actual malicious intent should be the standard for punitive damages because the deterrent purposes of such damages would be served only if the threshold for those damages is higher in every case than the underlying standard for liability in the first instance. The common-law rule is otherwise, and there is no reason to depart from the common-law rule in the context of § 1983. Pp. 51–55.

663 F. 2d 778, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 56. O'CONNOR, J., filed a dissenting opinion, *post*, p. 92.

Robert Presson argued the cause for petitioner. With him on the brief were *John Ashcroft*, Attorney General of Missouri, and *Paul Robert Otto*, Assistant Attorney General.

Bradley H. Lockenvitz argued the cause and filed a brief for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

We granted certiorari in this case, 456 U. S. 924 (1982), to decide whether the District Court for the Western District of Missouri applied the correct legal standard in instructing the jury that it might award punitive damages under 42 U. S. C. § 1983 (1976 ed., Supp. V).[1] The Court of Appeals for the Eighth Circuit sustained the award of punitive damages. *Wade* v. *Haynes*, 663 F. 2d 778 (1981). We affirm.

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[1] Rev. Stat. § 1979, amended, 93 Stat. 1284. Section 1983 reads in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

I

The petitioner, William H. Smith, is a guard at Algoa Reformatory, a unit of the Missouri Division of Corrections for youthful first offenders. The respondent, Daniel R. Wade, was assigned to Algoa as an inmate in 1976. In the summer of 1976 Wade voluntarily checked into Algoa's protective custody unit. Because of disciplinary violations during his stay in protective custody, Wade was given a short term in punitive segregation and then transferred to administrative segregation. On the evening of Wade's first day in administrative segregation, he was placed in a cell with another inmate. Later, when Smith came on duty in Wade's dormitory, he placed a third inmate in Wade's cell. According to Wade's testimony, his cellmates harassed, beat, and sexually assaulted him.

Wade brought suit under 42 U. S. C. § 1983 against Smith and four other guards and correctional officials, alleging that his Eighth Amendment rights had been violated. At trial his evidence showed that he had placed himself in protective custody because of prior incidents of violence against him by other inmates. The third prisoner whom Smith added to the cell had been placed in administrative segregation for fighting. Smith had made no effort to find out whether another cell was available; in fact there was another cell in the same dormitory with only one occupant. Further, only a few weeks earlier, another inmate had been beaten to death in the same dormitory during the same shift, while Smith had been on duty. Wade asserted that Smith and the other defendants knew or should have known that an assault against him was likely under the circumstances.

During trial, the District Judge entered a directed verdict for two of the defendants. He instructed the jury that Wade could make out an Eighth Amendment violation only by showing "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." Tr. 639. Further, because of Smith's qualified immunity as a prison guard, see *Procunier* v. *Navarette*, 434 U. S. 555 (1978), the judge instructed the jury that Wade could recover only if the defendants were guilty of "gross negligence" (defined as "a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act") or "[e]gregious failure to protect" (defined as "a flagrant or remarkably bad failure to protect") Wade. Tr. 641–642. He reiterated that Wade could not recover on a showing of simple negligence. *Id.*, at 644.

The District Judge also charged the jury that it could award punitive damages on a proper showing:

> "In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.
>
> "If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be *a reckless or callous disregard of, or indifference to, the rights or safety of others*, then you may assess punitive or exemplary damages in addition to any award of actual damages.
>
> ". . . The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct." *Id.*, at 643 (emphasis added).

The jury returned verdicts for two of the three remaining defendants. It found Smith liable, however, and awarded $25,000 in compensatory damages and $5,000 in punitive damages. The District Court entered judgment on the verdict, and the Court of Appeals affirmed. *Wade* v. *Haynes*, 663 F. 2d 778 (1981).

In this Court, Smith attacks only the award of punitive damages. He does not challenge the correctness of the instructions on liability or qualified immunity, nor does he question the adequacy of the evidence to support the verdict of liability for compensatory damages.

II

Section 1983 is derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13. It was intended to create "a species of tort liability" in favor of persons deprived of federally secured rights. *Carey* v. *Piphus*, 435 U. S. 247, 253 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976). We noted in *Carey* that there was little in the section's legislative history concerning the damages recoverable for this tort liability, 435 U. S., at 255. In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute. *Id.*, at 253–264. We have done the same in other contexts arising under § 1983, especially the recurring problem of common-law immunities.[2]

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[2] *Briscoe* v. *LaHue*, 460 U. S. 325 (1983); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981); *Procunier* v. *Navarette*, 434 U. S. 555 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976); *Wood* v. *Strickland*, 420 U. S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951).

JUSTICE REHNQUIST's dissent faults us for referring to modern tort decisions in construing § 1983. Its argument rests on the unstated and unsupported premise that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve. *Post*, at 65–68; see also *post*, at 92–93 (O'CONNOR, J., dissenting). The dissents are correct, of course, that when the language of the section and its legislative history provide no clear answer, we have found useful guidance in the law prevailing at the time when § 1983 was enacted; but it does not follow that that law is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general tort law had changed substantially in the intervening century (which is not the case here), we might be highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine. See *Carey* v. *Piphus*, 435 U. S. 247, Smith correctly concedes that "punitive damages are available in a 'proper' § 1983 action . . . ." *Carlson* v. *Green*, 446 U. S. 14, 22 (1980); Brief for Petitioner 8. Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court.[3] It was likewise generally established that individual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants.[4] See also *Scott* v. *Donald*, 165 U. S. 58, 77–89 (1897) (punitive damages for constitutional tort). Further, although the precise issue of the availability of punitive damages under § 1983 has never come squarely

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257–258 (1978) ("[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well") (footnote omitted); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 231–232 (1970) (**Brennan**, J., concurring and dissenting); *Pierson*, *supra*, at 555 (citing modern authority for "the prevailing view in this country"); *Wood*, *supra*, at 318–319, and n. 9; *Tenney*, *supra*, at 375, and n. 5. Indeed, in *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted, 424 U. S., at 421–422. Under the dissents' view, *Imbler* was wrongly decided.

[3] See, *e. g.*, the cases cited in nn. 8 and 12, *infra; Day* v. *Woodworth*, 13 How. 363 (1852); *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859); *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U. S. 489 (1876); *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512 (1885); *Barry* v. *Edmunds*, 116 U. S. 550 (1886); *Minneapolis & St. Louis R. Co.* v. *Beckwith*, 129 U. S. 26 (1889); *Scott* v. *Donald*, 165 U. S. 58 (1897).

[4] *E. g.*, *Nightingale* v. *Scannell*, 18 Cal. 315, 324–326 (1861); *Friend* v. *Hamill*, 34 Md. 298, 314 (1871); *Lynd* v. *Picket*, 7 Minn. 184, 200–202 (1862); *Parker* v. *Shackelford*, 61 Mo. 68, 72 (1875); *Rodgers* v. *Ferguson*, 36 Tex. 544 (1871); see, *e. g.*, *Stinson* v. *Buisson*, 17 La. 567, 572–573 (1841); *Nagle* v. *Mullison*, 34 Pa. 48 (1859); *Von Storch* v. *Winslow*, 13 R. I. 23, 24–25 (1880). Cf. *Brewer* v. *Watson*, 71 Ala. 299, 307 (1882). See also, *e. g.*, *Lane* v. *Yamamoto*, 2 Haw. App. 176, 628 P. 2d 634 (1981); *Wilson* v. *Eagan*, 297 N. W. 2d 146, 148–150 (Minn. 1980).

before us, we have had occasion more than once to make clear our view that they are available; indeed, we have rested decisions on related questions on the premise of such availability.[5]

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[5] In *Newport* v. *Fact Concerts, Inc.*, *supra*, for example, we held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under § 1983. A significant part of our reasoning was that deterrence of constitutional violations would be adequately accomplished by allowing punitive damages awards directly against the responsible individuals:

"Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [§ 1983] directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office." *Id.*, at 269–270 (footnote omitted).

Similarly, in *Carlson* v. *Green*, 446 U. S. 14 (1980), we stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones. *Id.*, at 22, and n. 9. See also *Adickes* v. *S. H. Kress & Co.*, *supra*, at 233 (BRENNAN, J., concurring and dissenting); *Carey* v. *Piphus*, *supra*, at 257, n. 11; *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 460 (1975) (punitive damages available under 42 U. S. C. § 1981).

JUSTICE REHNQUIST's dissent, without squarely denying that punitive damages are available under § 1983, does its best to cast doubt on the proposition. It argues that the phrase "for redress" at the end of the section means that Congress intended to limit recovery to compensatory damages. *Post*, at 85; see n. 1, *supra*. This novel construction is strained; a more plausible reading of the statute is that the phrase "or other proper proceeding for redress" is simply an expansive alternative to the preceding phrases "action at law" and "suit in equity," intended to avoid any unwanted technical limitations that might lurk in the other phrases.

Next JUSTICE REHNQUIST points to two other statutes enacted in 1863 and 1870 that provided expressly for punitive remedies. *Post*, at 85–86. Neither of these statutes enacted a punitive damages remedy as such, although they did create other forms of punitive civil remedies. The Act of March 2, 1863, § 3, 12 Stat. 698, created a civil fine for fraudulent military claims, apparently intended to stimulate suit by private attorneys general.

Smith argues, nonetheless, that this was not a "proper" case in which to award punitive damages. More particularly, he attacks the instruction that punitive damages could be awarded on a finding of reckless or callous disregard of or indifference to Wade's rights or safety. Instead, he contends that the proper test is one of actual malicious intent—"ill will, spite, or intent to injure."[6] Brief for Petitioner 9.

The Act of July 8, 1870, § 59, 16 Stat. 207, was the treble damages provision of the revised patent code. These statutes do not support JUSTICE REHNQUIST's speculation that Congress acted expressly when it intended to approve punitive damages, since both statutes created new remedies not available at common law; moreover, they undercut his argument that Congress was hostile to punitive civil remedies in favor of private parties.

Finally, JUSTICE REHNQUIST argues that Congress would not likely have approved "this often-condemned doctrine" in the 1871 Civil Rights Act. *Post*, at 84. This speculation is remarkable, to say the least, given that Congress did approve a punitive civil remedy in an 1870 Civil Rights Act. Act of May 31, 1870, § 2, 16 Stat. 140 (creating private cause of action for fixed penalty on behalf of persons suffering racial discrimination in voting registration). Cf. 1889 Colo. Sess. Laws 64 (enacting punitive damages statute, including awards for "wanton and reckless disregard," five years after state court held against doctrine). At any rate, the punitive damages debate, though lively, was by no means one-sided. See, *e. g.*, *Missouri Pacific R. Co.* v. *Humes*, *supra*, at 521–523; *Linsley* v. *Bushnell*, 15 Conn. 225, 235–237 (1842); *Frink & Co.* v. *Coe*, 4 Greene 555, 559–560 (Iowa 1854); *Chiles* v. *Drake*, 59 Ky. 146, 152–153 (1859); *Lynd* v. *Picket*, *supra*, at 200–201; *Taylor* v. *Grand Trunk R. Co.*, 48 N. H. 304, 320 (1869), overruled, *Fay* v. *Parker*, 53 N. H. 342 (1872); *Mayer* v. *Frobe*, 40 W. Va. 246, 22 S. E. 58 (1895); *Cosgriff Brothers* v. *Miller*, 10 Wyo. 190, 236–237, 68 P. 206, 216–217 (1902). See also *Tillotson* v. *Cheetham*, 3 Johns. 56, 63–64 (N. Y. 1808) (Kent, C. J.).

[6] Smith uses the term "actual malice" to refer to the standard he would apply. While the term may be an appropriate one, we prefer not to use it, simply to avoid the confusion and ambiguity that surrounds the word "malice." See n. 8, *infra*. Indeed, as Smith recognizes, this Court has used the very term "actual malice" in the defamation context to refer to a recklessness standard. Brief for Petitioner 8–9; see *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245, 251–252 (1974); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964).

We note in passing that it appears quite uncertain whether even JUSTICE REHNQUIST's dissent ultimately agrees with Smith's view that "ill will, spite, or intent to injure" should be required to allow punitive damages

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He offers two arguments for this position: first, that actual intent is the proper standard for punitive damages in all cases under § 1983; and second, that even if intent is not always required, it should be required here because the threshold for punitive damages should always be higher than that for liability in the first instance. We address these in turn.

III

Smith does not argue that the common law, either in 1871 or now, required or requires a showing of actual malicious in-

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awards. JUSTICE REHNQUIST consistently confuses, and attempts to blend together, the quite distinct concepts of *intent to cause* injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other. For instance, his dissent purports to base its analysis on the "fundamental distinction" between "wrongful motive, actual intention to inflict harm *or intentional doing of an act known to be unlawful*," versus "very careless or negligent conduct," *post*, at 60–61 (emphasis added). Yet in the same paragraph, the dissent inaccurately recharacterizes the first element of this distinction as "acts that are intentionally harmful," requiring "inquiry into the actor's subjective motive and purpose." *Post*, at 63–64. Consciousness of consequences or of wrongdoing, of course, does not require injurious intent or motive; it is equally consistent with indifference toward or disregard for consequences. This confusion of standards continues throughout the opinion. JUSTICE REHNQUIST's dissent frequently uses such phrases as "intent to injure" or "evil motive"; yet at several points it refers more broadly to "subjective mental state" or like phrases, and expressly includes consciousness (as opposed to intent) in its reasoning. *Post*, at 63, n. 3, 71–72, n. 7, 72–73. More telling, perhaps, is its citation of cases and treatises, which frequently and consistently includes authority supporting (at most) a consciousness requirement rather than the "actual intent" standard for which the opinion purports to argue elsewhere. See, *e. g.*, *post*, at 76–77, n. 10, 78–84, n. 12.

If JUSTICE REHNQUIST does indeed mean to propose a standard reaching subjective consciousness as well as actual injurious intent, one wonders why the instructions given in this case, *supra*, at 33, do not meet his standard. It is hard to see how Smith could have disregarded or been indifferent to the danger to Wade unless he was subjectively conscious of that danger. If JUSTICE REHNQUIST stands by his "fundamental distinction" and his use of authority, then, he has no apparent reason to dissent from our judgment.

tent for recovery of punitive damages. See Tr. of Oral Arg. 5-6, 9.[7]

Perhaps not surprisingly, there was significant variation (both terminological and substantive) among American jurisdictions in the latter 19th century on the precise standard to be applied in awarding punitive damages—variation that was exacerbated by the ambiguity and slipperiness of such common terms as "malice" and "gross negligence."[8] Most of the

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[7] Indeed, the District Judge's instruction on punitive damages in this case was drawn with only slight alteration from a standard jury instruction manual under Missouri state law. See Tr. 576-577; Tr. of Oral Arg. 9, 42-43.

[8] This terminological difficulty seems to be responsible in some degree for the dissent's error in asserting that intent was the majority rule in 1871, *post*, at 68-84. In particular, the dissent argues that "malice," "wantonness," and "willfulness" denoted actual ill will or intent to cause injury. See nn. 10, 12, *infra; post*, at 60-64, n. 3, 73, n. 8, 76-77, n. 10, 78-84, n. 12. See also n. 6, *supra* (dissent's confusion of knowledge with intent); n. 9, *infra* (concerning "criminal indifference"). With regard to "malice," the assumption is dubious at best; with regard to "wantonness" and "willfulness," it is just plain wrong.

"Malice," as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings. See generally, *e. g.*, 2 J. Sutherland, Law of Damages § 394 (3d ed. J. Berryman, 1903); 25 Cyclopedia of Law and Procedure 1666-1669 (1907). As the dissent correctly states, *post*, at 60-64, n. 3, in some instances (especially when it was modified by terms such as "actual" or "express," or in criminal law, where terms were generally more strictly construed than in civil law), it meant what the dissent says it meant—actual ill will, spite, or intent to injure. On the other extreme, in tort law, it was often used without modification to mean what was sometimes called "implied malice"—a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended. The term was sometimes, though not often, used in this fictional sense as a ground for punitive damages. *E. g.*, *Childers* v. *San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 289, 38 P. 903, 904-905 (1894). In other cases it was explained to mean an intent to do the act that caused the injury, as opposed to intent to cause the injury itself. *E. g.*, *Goetz* v. *Ambs*, 27 Mo. 28, 32-33 (1858). More commonly in the punitive damages context, the term meant something in between fictional malice and actual injurious confusion, however, seems to have been over the degree of negligence, recklessness, carelessness, or culpable indifference that should be required—not over whether actual intent

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intent—"that form of malice . . . where, without 'deliberate mind' or 'formed design,' the offender has been so grossly and recklessly negligent, so wantonly indifferent to another's rights, that he should be required to pay damages in excess of mere compensation as a punishment and example." *Press Pub. Co.* v. *McDonald*, 63 F. 238, 246 (CA2 1894). Accord, *e. g.*, *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202, 214 (1859); *South & N. A. R. Co.* v. *McLendon*, 63 Ala. 266, 273–275 (1879); *Yerian* v. *Linkletter*, 80 Cal. 135, 138, 22 P. 70, 71 (1889) (Paterson, J., concurring); *Cameron* v. *Bryan*, 89 Iowa 214, 219, 56 N. W. 434 (1893); *Lynd* v. *Picket*, 7 Minn., at 200–202.

There was considerably less ambiguity or confusion concerning the meaning of "wantonness" in tort law:

> "Wanton means reckless—without regard to the rights of others. . . . Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others. Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights; it has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure." 30 American and English Encyclopedia of Law 2–4 (2d ed. 1905) (footnotes omitted).

The last sentence of that definition could have been written with this case in mind. See also, *e. g.*, 40 Cyclopedia of Law and Procedure 292–295 (1912). The word was used with the same meaning in the punitive damages context. See, *e. g.*, *Texarkana Gas & Electric Light Co.* v. *Orr*, 59 Ark. 215, 224, 27 S. W. 66, 68 (1894); *Welch* v. *Durand*, 36 Conn. 182, 184–185 (1869); *Southern Kansas R. Co.* v. *Rice*, 38 Kan. 398, 403–404, 16 P. 817, 820 (1888).

Finally, "willfulness" did not mean intent to cause injury, but only voluntary action:

> "Wilful . . . generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent. And wilfully does not imply that an act done in that spirit was necessarily a malicious act. . . ." 30 American and English Encyclopedia of Law 529–530 (2d ed. 1905) (footnote omitted).

was essential. On the contrary, the rule in a large majority of jurisdictions was that punitive damages (also called exemplary damages, vindictive damages, or smart money) could be awarded without a showing of actual ill will, spite, or intent to injure.

This Court so stated on several occasions, before and shortly after 1871. In *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859), a diversity libel suit, the Court held erroneous an instruction that authorized the jury to return a punitive award but gave the jury virtually no substantive guidance as to the proper threshold. We described the standard thus:

> "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, *or of criminal indifference to civil obligations.*" *Id.*, at 214 (emphasis added).[9]

"Wilful neglect or negligence has been defined as that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest." *Id.*, at 535 (footnote omitted).

See also, *e. g.*, 40 Cyclopedia of Law and Procedure 944–947 (1912). Again, the punitive damages cases bear this reading out. *Cameron, supra*, at 219, 56 N. W., at 434; *Goetz, supra*, at 32–33; *Chiles* v. *Drake*, 59 Ky., at 152–155; *Peoria Bridge Assn.* v. *Loomis*, 20 Ill. 235, 251 (1858).

[9] JUSTICE REHNQUIST's dissent reads this statement as a requirement of actual intent, *post*, at 68–69. This misreading depends in part on the faulty assumption, see n. 8, *supra*, that "malice" always meant intent to injure (*post*, at 68)—a reading particularly inappropriate in light of the Court's express definition of malice as including "criminal indifference." As for the latter point, JUSTICE REHNQUIST reasons that the term "criminal indifference" must include an element of actual malicious intent. This surprising interpretation of the word "indifference" rests on the unstated

The Court further explained the standard for punitive damages in *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U. S. 489 (1876), a diversity railroad collision case:

> "Redress commensurate to such [personal] injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, *or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them.* In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." *Id.*, at 493.
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> " . . . To [assess punitive damages], there must have been some wilful misconduct, *or that entire want of care*

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and demonstrably false premise that intent to cause injury was always an element of crime. Not only were there crimes of recklessness or negligence (such as reckless homicide), but even crimes of intent commonly required only intent to do the criminal act (and, in some cases, knowledge that the injury would likely follow), rather than actual ill will or purpose to inflict an injury. See, *e. g.*, 1 J. Bishop, Commentaries on Criminal Law §§ 313–322 (5th ed. 1872); J. May, Law of Crimes §§ 30, 31, 232, 233 (2d ed. J. Beale, 1893); see also, *e. g.*, Model Penal Code § 2.02 (Tent. Draft No. 4, 1955). The case law clearly illustrates that "criminal" did not mean "with injurious intent" in the punitive damages context. *E. g.*, *Hopkins* v. *Atlantic & St. L. R. Co.*, 36 N. H. 9, 18–19 (1857), overruled on other grounds, *Fay* v. *Parker*, 53 N. H. 342 (1872); *Brooke* v. *Clark*, 57 Tex. 105, 112–114 (1880); *Meibus* v. *Dodge*, 38 Wis. 300, 310–311 (1875).

JUSTICE REHNQUIST also cites *Day* v. *Woodworth*, 13 How. 363, 371 (1852), in support of an actual-intent requirement. *Post*, at 70. The language used in that case ("wanton and malicious, or gross and outrageous") was precisely the precedent that the *Philadelphia* Court was exegeting in the passage quoted in text, when it held that "malice" includes "criminal indifference." Moreover, the *Day* case did not present any issue of punitive damages; the Court discussed them merely as a sidelight to the costs-and-fees issue presented.

> *which would raise the presumption of a conscious indifference to consequences.*" *Id.*, at 495 (emphasis added).

The Court therefore held erroneous a jury instruction allowing a punitive award on "gross negligence"; it concluded that the latter term was too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard. It remanded for a new trial.[10]

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[10] As with *Philadelphia*, n. 9, *supra*, JUSTICE REHNQUIST's dissent reads this case as imposing a requirement of actual malicious intent, on the assumption that when the Court said "indifference to consequences" it really meant "intent to cause consequences," and when it said "recklessness" it really meant "bad motive or intent to injure." *Post*, at 70–73. This textual alchemy is untenable. For one thing, JUSTICE REHNQUIST's analysis of the case reflects the confusion in his dissent of motive with consciousness, see n. 6, *supra; post*, at 71–72, n. 7. Moreover, the *Milwaukee* Court did not say, or come close to saying, that recklessness is *identical* to intent, or that it is material only as *evidence* of intent; rather, it said that recklessness is "*equivalent*" to intent, meaning that the two are equally culpable and deserving of punishment and deterrence. 91 U. S., at 493. This also explains the Court's reference, two sentences later, to "evil motive," *ibid.* JUSTICE REHNQUIST's great reliance on this sentence confuses the *standard* for punitive damages with the *rationale* for them. Plainly, read in context, what the Court meant is that punitive damages are justified by the moral culpability of evil intent, or by the "equivalent" culpability of "reckless indifference to the rights of others." See also *Cowen* v. *Winters*, 96 F. 929, 934–935 (CA6 1899); *Alabama G. S. R. Co.* v. *Hill*, 90 Ala. 71, 80, 8 So. 90, 93 (1890); *Memphis & C. R. Co.* v. *Whitfield*, 44 Miss. 466, 494–495 (1870); *Thirkfield* v. *Mountain View Cemetery Assn.*, 12 Utah 76, 82, 41 P. 564, 565 (1895). The contrary reading adopted by JUSTICE REHNQUIST's dissent is flatly inconsistent with the Court's reiteration of the rule, 91 U. S., at 495 (emphasis added): "that entire want of care which would raise the presumption of a *conscious indifference to consequences.*" Try as he might, JUSTICE REHNQUIST cannot transform indifference, conscious or otherwise, into intent.

JUSTICE REHNQUIST also relies on a four-sentence capsulization by the Reporter of Decisions of our unreported decision in *Western Union Telegraph Co.* v. *Eyser*, 91 U. S. 495, decided the same day. While the Reporter's summary does speak of the absence of "intentional wrong," *id.*, at 496, the factual context suggests that the basis of decision was the jury instruction that ordinary negligence would warrant punitive damages, com-

Ten years later, the Court in dictum suggested that perhaps even gross negligence would suffice after all, at least in some cases:

> "For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may be perhaps considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment." *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512, 521 (1885).

See also *Minneapolis & St. Louis R. Co.* v. *Beckwith*, 129 U. S. 26, 34 (1889) ("culpable negligence").[11]

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bined with the fact that the defendant had taken some affirmative (though insufficient) steps to avoid injury to passersby. Thus, in context, the reference to "intentional wrong" is entirely consistent with the *Milwaukee* decision's test of "conscious indifference"; the defendant in *Western Union* was not indifferent to injury, but instead plainly intended to *avoid* injury.

[11] In two other cases the Court reaffirmed the *Philadelphia* "criminal indifference" standard and the *Milwaukee* "reckless indifference" standard. *Barry* v. *Edmunds*, 116 U. S., at 563; *Denver & R. G. R. Co.* v. *Harris*, 122 U. S. 597, 609–610 (1887).

JUSTICE REHNQUIST's dissent relies on two later decisions of this Court, neither of which supports it. *Post*, at 74–75. In *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101 (1893), the issue was whether a corporation could be liable in punitive damages for the tort of its employee. The Court, reasoning largely from general principles of *respondeat superior*, held that such vicarious liability could exist only when the employer had authorized or ratified the tort. In so doing, however, it expressly reaffirmed as "well settled" the general standard announced in the *Philadelphia* case, including liability for "criminal indifference." 147 U. S., at 107. JUSTICE REHNQUIST cites a passage quoting from one state case suggesting an intent requirement, *post*, at 74, but he omits to mention the court's extensive quotations from *Philadelphia* and *Milwaukee*, 147 U. S., at 112–113, and its express approval of and quotation from other state cases stating unequivocally that an employer can be liable for its own recklessness in hiring unfit employees, *id.*, at 114–116. See also n. 9, *supra*. In *Scott* v. *Donald*, 165 U. S., at 71–90, the issue was whether there was a sufficient amount in controversy. The Court held that allegations of

The large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent; they permitted punitive awards on variously stated standards of negligence, recklessness, or other culpable conduct short of actual malicious intent.[12]

"intentional, malicious and repeated interference" with federally protected rights, *id.*, at 89, were enough, if proved, to warrant punitive damages. The Court undertook no statement of a general standard for punitive damages beyond noting the unsurprising principle that such damages are awardable on proof of actual evil motive, *id.*, at 86. Under the allegations, of course, no question of liability for less culpable conduct was presented.

[12] In the often-cited case of *Welch* v. *Durand*, 36 Conn. 182 (1869), for example, the court held that punitive damages were proper where the defendant's pistol bullet, fired at a target, ricocheted and hit the plaintiff:

"In what cases then may smart money be awarded in addition to the damages? The proper answer to this question . . . seems to be, in actions of tort founded on the malicious or wanton misconduct or culpable neglect of the defendant. . . .

"In this case the defendant was guilty of wanton misconduct and culpable neglect. . . . It is an immaterial fact that the injury was unintentional, and that the ball glanced from the intended direction. . . . [I]f the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent." *Id.*, at 185.

In *Frink & Co.* v. *Coe*, 4 Greene 555 (Iowa 1854), punitive damages were awarded against a stage company for employing a known drunkard as a driver, the court saying:

"In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained.

. . . . .

"If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an '*intent* or *design*' to do the injury does not appear." *Id.*, at 559 (emphasis in original).

Maysville & Lexington R. Co. v. *Herrick*, 76 Ky. 122 (1877), held that the trial court correctly refused to instruct the jury that "willful or intentional

The same rule applies today. The Restatement (Second) of Torts (1979), for example, states: "Punitive damages may be awarded for conduct that is outrageous, because of the de-

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wrong" was required to award punitive damages in a railroad accident case, remarking:

> "The absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence; and to enable a passenger to recover punitive damages, in a case like this, it is not necessary to show the absence of all care, or 'reckless indifference to the safety of . . . passengers,' or 'intentional misconduct' on the part of the agents and officers of the company." *Id.*, at 127 (ellipsis in original).

Accord, *e. g.*, *Cowen* v. *Winters*, 96 F., at 934–935; *Press Pub. Co.* v. *McDonald*, 63 F., at 245–247; *Morning Journal Assn.* v. *Rutherford*, 51 F. 513, 514–515 (CA2 1892); *Fotheringham* v. *Adams Express Co.*, 36 F. 252, 253–254 (CC ED Mo. 1888); *United States* v. *Taylor*, 35 F. 484, 488 (CC SD Ala. 1888); *Malloy* v. *Bennett*, 15 F. 371, 373–374 (CC SDNY 1883); *Berry* v. *Fletcher*, 3 F. Cas. 286, 288 (No. 1,357) (CC Mo. 1870); *Alabama G. S. R. Co.* v. *Arnold*, 80 Ala. 600, 608, 2 So. 337, 342 (1886); *Texarkana Gas & Electric Light Co.* v. *Orr*, 59 Ark., at 224, 27 S. W., at 68; *Dorsey* v. *Manlove*, 14 Cal. 553, 555–556 (1860); *Florida Railway & Navigation Co.* v. *Webster*, 25 Fla. 394, 419–420, 5 So. 714, 719 (1889); *Jacobus* v. *Congregation of Children of Israel*, 107 Ga. 518, 521, 33 S. E. 853, 855 (1899); *Drohn* v. *Brewer*, 77 Ill. 280, 282–283 (1875); *Citizens' St. R. Co.* v. *Willoeby*, 134 Ind. 563, 569–570, 33 N. E. 627, 629 (1893); *Sawyer* v. *Sauer*, 10 Kan. 466, 470 (1872); *Goddard* v. *Grand Trunk R. Co.*, 57 Me. 202, 218 (1869); *Lynd* v. *Picket*, 7 Minn., at 200–202; *Memphis & C. R. Co.* v. *Whitfield*, 44 Miss., at 494–495, 500; *Buckley* v. *Knapp*, 48 Mo. 152, 161–162 (1871); *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282, 296 (1872); *Sullivan* v. *Oregon Railway & Navigation Co.*, 12 Ore. 392, 404–406, 7 P. 508, 517 (1885) (dictum); *Lake Shore & M. S. R. Co.* v. *Rosenzweig*, 113 Pa. 519, 543–544, 6 A. 545, 552–553 (1886); *Hart* v. *Charlotte, C. & A. R. Co.*, 33 S. C. 427, 435–436, 12 S. E. 9, 10 (1890); *Haley* v. *Mobile & O. R. Co.*, 66 Tenn. 239, 242–243 (1874); *Brooke* v. *Clark*, 57 Tex., at 112–114; *Thirkfield* v. *Mountain View Cemetery Assn.*, 12 Utah, at 82, 41 P., at 564–565; *Earl* v. *Tupper*, 45 Vt. 275, 286–287 (1873) (dictum); *Borland* v. *Barrett*, 76 Va. 128, 132–134 (1882); *Pickett* v. *Crook*, 20 Wis. 358, 359 (1866); *Union Pacific R. Co.* v. *Hause*, 1 Wyo. 27, 35 (1871).

JUSTICE REHNQUIST's assertion that a "solid majority of jurisdictions" required actual malicious intent, *post*, at 84, is simply untrue. In fact, there were fairly few jurisdictions that imposed such a requirement, and fewer yet that adhered to it consistently. JUSTICE REHNQUIST's attempt fendant's evil motive *or his reckless indifference to the rights of others.*" § 908(2) (emphasis added); see also *id.*, Comment *b.* Most cases under state common law, although varying in

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to establish this proposition with case citations, *post*, at 78–84, n. 12, does not offer him substantial support. Because the point is not of controlling significance, see n. 2, *supra*, we will not tarry here to analyze his citations case-by-case or State-by-State, but will only summarize the main themes.

Several of JUSTICE REHNQUIST's cases actually offer unequivocal support for the rule that punitive damages are available on a showing of negligence, recklessness, disregard for or indifference to the rights of others, and various other standards short of actual ill will or injurious intent. In this same vein, JUSTICE REHNQUIST continues to try to equate consciousness or knowledge with actual ill will or intent to injure, see n. 6, *supra*.

Other cases do not clearly support either JUSTICE REHNQUIST's view or ours. Some of these contain contradictory language in their formulations, indicating that the present distinction perhaps did not occur to the writers. Others support JUSTICE REHNQUIST's rule only if one makes the questionable assumption, see nn. 8, 9, *supra*, that terms like "malice," "wantonness," and "criminal" always meant actual intent to injure. Still others simply ruled on collateral questions (such as the admissibility of evidence of bad motive or of good faith) without purporting to state any general standard for punitive damages. Some were apparently limited to particular classes of torts. A comparison of this class of cases with those cited *supra*, this note, reveals that in many instances other decisions of the same courts clear up any ambiguity in favor of a recklessness or negligence standard.

A third class of cases are those in which the courts simply affirmed awards of punitive damages based on evidence of, or jury instructions requiring, actual malicious intent, without discussing whether a lesser showing might also be adequate. Often the cases in this category involved assault and battery or similar torts, where the facts presented little problem of negligence or recklessness. See also n. 11, *supra*. As with the previous category, many of the same courts spoke more directly in other cases, making it clear that injurious intent was *not* required.

Finally, even of those comparatively few cases that do seem to support JUSTICE REHNQUIST's view, many are of debatable authority. In nearly every State there was at least some late 19th-century authority supporting awards on less than ill will or intent to injure. Admittedly, in a few States this was the less accepted view, but in a substantial majority of jurisdictions the prevailing rule (as evidenced by the cases cited *supra*, this note, and numerous other cases not listed here) was that no such actual malicious intent was required.

their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.[13]

The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action. Smith offers us no persuasive reason to the contrary.

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[13] *Loch Ridge Construction Corp.* v. *Barra*, 291 Ala. 312, 280 So. 2d 745 (1973); *Sturm, Ruger & Co.* v. *Day*, 594 P. 2d 38 (Alaska 1979), modified on other grounds, 615 P. 2d 621 (1980), and 627 P. 2d 204 (1981); *Huggins* v. *Deinhard*, 127 Ariz. 358, 621 P. 2d 45 (App. 1980); *White* v. *Brock*, 41 Colo. App. 156, 584 P. 2d 1224 (1978); *Collens* v. *New Canaan Water Co.*, 155 Conn. 477, 234 A. 2d 825 (1967); *Sheats* v. *Bowen*, 318 F. Supp. 640 (Del. 1970) (Delaware law); *Spar* v. *Obwoya*, 369 A. 2d 173 (D. C. 1977); *Adams* v. *Whitfield*, 290 So. 2d 49 (Fla. 1974); *Randall* v. *Ganz*, 96 Idaho 785, 537 P. 2d 65 (1975); *Pendowski* v. *Patent Scaffolding Co.*, 89 Ill. App. 3d 484, 411 N. E. 2d 910 (1980), appeal denied (Ill. 1981); *Meyer* v. *Nottger*, 241 N. W. 2d 911 (Iowa 1976); *Ford* v. *Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P. 2d 254 (1976); *Pettengill* v. *Turo*, 159 Me. 350, 193 A. 2d 367 (1963); *American Laundry Machine Industries* v. *Horan*, 45 Md. App. 97, 412 A. 2d 407 (1980); *Bailey* v. *Graves*, 411 Mich. 510, 309 N. W. 2d 166 (1981); *Huebsch* v. *Larson*, 291 Minn. 361, 191 N. W. 2d 433 (1971); *Mississippi Power Co.* v. *Jones*, 369 So. 2d 1381 (Miss. 1979); *Stenson* v. *Laclede Gas Co.*, 553 S. W. 2d 309 (Mo. App. 1977); *Butcher* v. *Petranek*, 181 Mont. 358, 593 P. 2d 743 (1979); *Berg* v. *Reaction Motors Division*, 37 N. J. 396, 181 A. 2d 487 (1962); *Robison* v. *Katz*, 94 N. M. 314, 610 P. 2d 201 (App.), cert. denied, 94 N. M. 675, 615 P. 2d 992 (1980); *Soucy* v. *Greyhound Corp.*, 27 App. Div. 2d 112, 276 N. Y. S. 2d 173 (1967); *Newton* v. *Standard Fire Insurance Co.*, 291 N. C. 105, 229 S. E. 2d 297 (1976); *Dahlen* v. *Landis*, 314 N. W. 2d 63 (N. D. 1981); *Leichtamer* v. *American Motors Corp.*, 67 Ohio St. 2d 456, 424 N. E. 2d 568 (1981); *Smith* v. *Johnston*, 591 P. 2d 1260 (Okla. 1978); *Focht* v. *Rabada*, 217 Pa. Super. 35, 268 A. 2d 157 (1970); *Sherman* v. *McDermott*, 114 R. I. 107, 329 A. 2d 195 (1974); *King* v. *Allstate Insurance Co.*, 272 S. C. 259, 251 S. E. 2d 194 (1979); *Hannahs* v. *Noah*, 83 S. D. 296, 158 N. W. 2d 678 (1968); *Inland Container Corp.* v. *March*, 529 S. W. 2d 43 (Tenn. 1975); *Shortle* v. *Central Vermont Public Service Corp.*, 137 Vt. 32, 399 A. 2d 517 (1979); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N. W. 2d 437 (1980).

Smith's argument, which he offers in several forms, is that an actual-intent standard is preferable to a recklessness standard because it is less vague. He points out that punitive damages, by their very nature, are not awarded to compensate the injured party. See *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349–350 (1974). He concedes, of course, that deterrence of future egregious conduct is a primary purpose of both § 1983, see *Newport*, *supra*, at 268; *Owen* v. *City of Independence*, 445 U. S. 622, 651 (1980); *Robertson* v. *Wegmann*, 436 U. S. 584, 591 (1978), and of punitive damages, see *Newport*, *supra*, at 268; Restatement (Second) of Torts § 908(1) (1979). But deterrence, he contends, cannot be achieved unless the standard of conduct sought to be deterred is stated with sufficient clarity to enable potential defendants to conform to the law and to avoid the proposed sanction Recklessness or callous indifference, he argues, is too uncertain a standard to achieve deterrence rationally and fairly. A prison guard, for example, can be expected to know whether he is acting with actual ill will or intent to injure, but not whether he is being reckless or callously indifferent.

Smith's argument, if valid, would apply to ordinary tort cases as easily as to § 1983 suits; hence, it hardly presents an argument for adopting a different rule under § 1983. In any event, the argument is unpersuasive. While, *arguendo*, an intent standard may be easier to understand and apply to particular situations than a recklessness standard, we are not persuaded that a recklessness standard is too vague to be fair or useful. In the *Milwaukee* case, 91 U. S. 489 (1876), we adopted a recklessness standard rather than a gross negligence standard precisely because recklessness would better serve the need for adequate clarity and fair application. Almost a century later, in the First Amendment context, we held that punitive damages cannot be assessed for defamation in the absence of proof of "knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. Our concern in *Gertz* was that the threat of punitive damages, if not limited to especially egregious cases, might "inhibit the vigorous exercise of First Amendment freedoms," *ibid.*—a concern at least as pressing as any urged by Smith in this case. Yet we did not find it necessary to impose an actual-intent standard there. Just as Smith has not shown why § 1983 should give higher protection from punitive damages than ordinary tort law, he has not explained why it gives higher protection than we have demanded under the First Amendment.

More fundamentally, Smith's argument for certainty in the interest of deterrence overlooks the distinction between a standard for punitive damages and a standard of liability in the first instance. Smith seems to assume that prison guards and other state officials look mainly to the standard for punitive damages in shaping their conduct. We question the premise; we assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law—both out of devotion to duty, and in the interest of avoiding liability for compensatory damages. At any rate, the conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance. The need for exceptional clarity in the standard for punitive damages arises only if one assumes that there are substantial numbers of officers who will not be deterred by compensatory damages; only such officers will seek to guide their conduct by the punitive damages standard. The presence of such officers constitutes a powerful argument *against* raising the threshold for punitive damages.

In this case, the jury was instructed to apply a high standard of constitutional right ("physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities"). It was also instructed, under the principle of qualified immunity, that Smith could not be held liable at all unless he was guilty of "a callous indifference or a thoughtless disregard for the consequences of [his] act or failure to act," or of "a flagrant or remarkably bad failure to protect" Wade. These instructions are not challenged in this Court, nor were they challenged on grounds of vagueness in the lower courts. Smith's contention that this recklessness standard is too vague to provide clear guidance and reasonable deterrence might more properly be reserved for a challenge seeking different standards of liability in the first instance. As for punitive damages, however, in the absence of any persuasive argument to the contrary based on the policies of § 1983, we are content to adopt the policy judgment of the common law—that reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 233 (1970) (BRENNAN, J., concurring and dissenting).

IV

Smith contends that even if § 1983 does not ordinarily require a showing of actual malicious intent for an award of punitive damages, such a showing should be required in this case. He argues that the deterrent and punitive purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability in the first instance. In this case, while the District Judge did not use the same precise terms to explain the standards of liability for compensatory and punitive damages, the parties agree that there is no substantial difference between the showings required by the two instructions; both apply a standard of reckless or callous indifference to Wade's rights. Hence, Smith argues, the District Judge erred in not requiring a higher standard for punitive damages, namely, actual malicious intent.

This argument incorrectly assumes that, simply because the instructions specified the same *threshold* of liability for punitive and compensatory damages, the two forms of damages were equally available to the plaintiff. The argument overlooks a key feature of punitive damages—that they are never awarded as of right, no matter how egregious the defendant's conduct. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award." D. Dobbs, Law of Remedies 204 (1973) (footnote omitted).[14] Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.[15] Hence, it is not entirely accurate to say that punitive and compensatory damages were awarded in this case on the same standard. To make its punitive award, the jury was required to find not only that Smith's conduct met the recklessness threshold (a question of ultimate fact), but *also* that his conduct merited a punitive award of $5,000 in addition to the compensatory award (a discretionary moral judgment).

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[14] See also, *e. g.*, Restatement (Second) of Torts § 908, Comment *d* (1979); J. Ghiardi & J. Kircher, Punitive Damages Law and Practice § 5.38 (1981); C. McCormick, Law of Damages 296 (1935); W. Prosser, Law of Torts 13 (4th ed. 1971); K. Redden, Punitive Damages § 3.4(A) (1980); *Chuy* v. *Philadelphia Eagles Football Club*, 595 F. 2d 1265, 1277–1278, n. 15 (CA3 1979) (en banc).

[15] The instructions in this case recognized this difference in treatment. The jury was instructed:

"If you find the issues in favor of the plaintiff, then you *must* award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained as a direct result of the conduct of the defendants . . . .

"In addition to actual damages, the law *permits* the jury, under certain circumstances, to award the injured person punitive and exemplary damages . . . .

"If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then you *may* assess punitive or exemplary damages in addition to any award of actual damages." Tr. 642–643 (emphasis added).

Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages."[16] Accordingly, in situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring any extra showing. Several courts have so held expressly.[17] Many other courts, not directly addressing the congruence of compensatory and punitive thresholds, have held that punitive damages are available on the same showing of fault as is required by the underlying tort in, for example, intentional infliction of emotional distress,[18] defamation of a public official or public figure,[19] and defamation covered by a common-law qualified immunity.[20]

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[16] Restatement of Torts § 908, Comment *c* (1939); Restatement (Second) of Torts § 908, Comment *c* (1979).

Although there is general agreement with the broad principle of § 908, Comment *c*, there is authority suggesting that the tort of malicious prosecution may have been a poorly chosen illustration of it. See, *e. g.*, *Adams* v. *Whitfield*, 290 So. 2d 49 (Fla. 1974); *Jordan* v. *Sauve*, 219 Va. 448, 247 S. E. 2d 739 (1978).

[17] *Huggins* v. *Deinhard*, 127 Ariz., at 359–360, 621 P. 2d, at 46–47; *Fletcher* v. *Western National Life Insurance Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970); *Sere* v. *Group Hospitalization, Inc.*, 443 A. 2d 33, 37–38 (D. C. 1982); *Meyer* v. *Nottger*, 241 N. W. 2d, at 922; *Newton* v. *Standard Fire Insurance Co.*, 291 N. C., at 112, 229 S. E. 2d, at 301–302 (dictum); *Hall* v. *May Department Stores Co.*, 292 Ore. 131, 144–145, 637 P. 2d 126, 134–135 (1981); *Chuy* v. *Philadelphia Eagles Football Club*, *supra*, at 1276–1278 (CA3 1979) (en banc) (Pennsylvania law); *Johnson* v. *Woman's Hospital*, 527 S. W. 2d 133, 141–142 (Tenn. App.), cert. denied (Tenn. 1975).

[18] See, *e. g.*, *Fletcher* v. *Western National Life Insurance Co.*, *supra*; *Sere* v. *Group Hospitalization, Inc.*, *supra*; *Cape Publications, Inc.* v.

This common-law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others, even though it some-

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Bridges, 387 So. 2d 436 (Fla. App. 1980); *Meyer* v. *Nottger, supra; Hall* v. *May Department Stores Co., supra; Chuy* v. *Philadelphia Eagles Football Club, supra* (en banc) (Pennsylvania law). See also *Johnson* v. *Woman's Hospital, supra* (tort of outrageous conduct). Contra, *Knierim* v. *Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157 (1961).

[19] See, *e. g.*, *Davis* v. *Schuchat*, 166 U. S. App. D. C. 351, 510 F. 2d 731 (1975) (District of Columbia law); *Fopay* v. *Noveroske*, 31 Ill. App. 3d 182, 334 N. E. 2d 79 (1975); *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (CA2 1969) (New York law); *Sprouse* v. *Clay Communication, Inc.*, 158 W. Va. 427, 211 S. E. 2d 674 (1975) (dictum). See also *Cape Publications, Inc.* v. *Bridges, supra* (false light).

In citing the cases in this footnote and in n. 20, *infra*, we intimate no view on any First Amendment issues they may raise.

[20] *E. g.*, *Pirre* v. *Printing Developments, Inc.*, 468 F. Supp. 1028 (SDNY) (Connecticut and New York law), affirmance order, 614 F. 2d 1290 (CA2 1979); *Weenig* v. *Wood*, 169 Ind. App. 413, 349 N. E. 2d 235 (1976); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980); *Snodgrass* v. *Headco Industries, Inc.*, 640 S. W. 2d 147 (Mo. App. 1982); *Miller* v. *Lear Siegler, Inc.*, 525 F. Supp. 46 (Kan. 1981) (Oklahoma law). See also n. 19, *supra*.

times chooses not to impose any liability for lesser degrees of fault.[21]

As with his first argument, Smith gives us no good reason to depart from the common-law rule in the context of § 1983. He argues that too low a standard of exposure to punitive damages in cases such as this threatens to undermine the policies of his qualified immunity as a prison guard. The same reasoning would apply with at least as much force to, for example, the First Amendment and common-law immunities involved in the defamation cases described above. In any case, Smith overstates the extent of his immunity. Smith is protected from liability for mere negligence because of the need to protect his use of discretion in his day-to-day decisions in the running of a correctional facility. See generally *Procunier* v. *Navarette*, 434 U. S. 555 (1978); *Wood* v. *Strickland*, 420 U. S. 308 (1975). But the immunity on which Smith relies is coextensive with the interest it protects.[22] The very fact that the privilege is qualified reflects a recognition that there is no societal interest in protecting those uses of a prison guard's discretion that amount to reckless or callous indifference to the rights and safety of the prisoners in his charge. Once the protected sphere of privilege is exceeded, we see no reason why state officers should not be liable for their reckless misconduct on the same basis as private tortfeasors.[23]

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[21] "Moreover, after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Carlson*, 446 U. S., at 22, n. 9.

[22] As we noted *supra*, at 33–34, Smith does not challenge the instruction on qualified immunity. We therefore assume for purposes of this case that the instruction was correct. See generally, *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555 (1978).

[23] We reject JUSTICE REHNQUIST's argument, *post*, at 92, that it somehow makes a difference that this suit was brought in federal court—as though it were inappropriate or unseemly that federal courts dare to enforce federal rights vigorously. Indeed, one wonders whether JUSTICE

V

We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. We further hold that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness. Because the jury instructions in this case are in accord with this rule, the judgment of the Court of Appeals is

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

This case requires us to determine what degree of culpability on the part of a defendant in an action under 42 U. S. C. § 1983 (1976 ed., Supp. V) will permit an award of punitive damages. The District Court instructed the jury that it could award punitive damages in favor of the plaintiff if it concluded that the defendant's conduct constituted "reckless or callous disregard of, or indifference to, the rights or safety of others." In my view, a forthright inquiry into the intent of the 42d Congress and a balanced consideration of the public policies at issue compel the conclusion that the proper standard for an award of punitive damages under § 1983 requires at least some degree of bad faith or improper motive on the part of the defendant.

REHNQUIST would complain as loudly if this § 1983 suit had been brought in state court, as it could have been. Although JUSTICE REHNQUIST casts his argument as an attack on meddling by federal *courts*, the true thrust of his complaint seems to be against federal *law—i. e.*, the Civil Rights Act of 1871. We have explained at length why we think that the policies of that statute call for our holding today.

The Court rejects a "wrongful intent" standard, instead requiring a plaintiff to show merely "reckless . . . indifference to the federally protected rights of others." The following justifications are offered by the Court for this result: first, the rule in "[m]ost cases [decided in the last 15 years] under state common law" is "more or less" equivalent to a recklessness standard; second, the Court asserts that a similar rule "prevail[ed] at the time when § 1983 was enacted"; and finally, there is an "absence of any persuasive argument" for not applying existing state tort rules to the federal statutory remedies available against state and local officials under § 1983. In my opinion none of these justifications, taken singly or together, supports the Court's result. First, the decisions of state courts in the last decade or so are all but irrelevant in determining the intent of the 42d Congress, and thus, the meaning of § 1983. Second, the Court's characterization of the common-law rules prevailing when § 1983 was enacted is both oversimplified and misleading; in fact, the majority rule in 1871 seems to have been that some sort of "evil intent"—and not mere recklessness—was necessary to justify an award of punitive damages. Third, the Court's inability to distinguish a *state* court's award of punitive damages against a state officer from a *federal* court's analogous action under §§ 1983 and 1988 precludes it from adequately assessing the public policies implicated by its decision. Finally, the Court fails utterly to grapple with the cogent and persuasive criticisms that have been offered of punitive damages generally.

I

Before examining these points, however, it is useful to consider briefly the purposes of punitive damages. A fundamental premise of our legal system is the notion that damages are awarded to *compensate* the victim—to redress the injuries that he or she *actually* has suffered. D. Dobbs, Law of Remedies § 3.1 (1973); C. McCormick, Law of Damages 1 (1935). In sharp contrast to this principle, the doctrine of punitive damages permits the award of "damages" beyond even the most generous and expansive conception of actual injury to the plaintiff. This anomaly is rationalized principally on three grounds. First, punitive damages "are assessed for the avowed purpose of visiting *a punishment* upon the defendant." *Id.*, at 275 (emphasis added); Dobbs, *supra*, §3.9, at 205; K. Redden, Punitive Damages §2.1 (1980); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979). Second, the doctrine is rationalized on the ground that it deters persons from violating the rights of others. *Ibid.* Third, punitive damages are justified as a "bounty" that encourages private lawsuits seeking to assert legal rights. *Ibid.*

Despite these attempted justifications, the doctrine of punitive damages has been vigorously criticized throughout the Nation's history. Countless cases remark that such damages have never been "a favorite of the law."[1] The year after §1983 was enacted, the New Hampshire Supreme Court declared: "The idea of [punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." *Fay* v. *Parker*, 53 N. H. 342, 382 (1872).[2] Such remarks reflect a number of deeply held reservations regarding punitive damages, which can only be briefly summarized here.

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[1] See, *e. g.*, *Williams* v. *Bone*, 74 Idaho 185, 189, 259 P. 2d 810, 812 (1953); *Jolley* v. *Puregro Co.*, 94 Idaho 702, 709, 496 P. 2d 939, 946 (1972); *Cays* v. *McDaniel*, 204 Ore. 449, 283 P. 2d 658 (1955); *First National Bank of Des Plaines* v. *Amco Engineering Co.*, 32 Ill App. 3d 451, 455, 335 N. E. 2d 591, 594 (1975). See also the numerous cases cited at 25 C. J. S., Damages §117(1), p. 1114, n. 18.5 (1966).

[2] See also *Spokane Truck & Dray Co.* v. *Hoefer*, 2 Wash. 45, 56, 25 P. 1072, 1075 (1891) ("we believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice . . ."); *Roose* v. *Perkins*, 9 Neb. 304, 315 (1879).

Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated. Moreover, although punitive damages are "quasi-criminal," *Huber* v. *Teuber*, 10 D. C. 484, 490 (1877), their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors. Walther & Plein, Punitive Damages: A Critical Analysis, 49 Marq. L. Rev. 369 (1965). We observed in *Electrical Workers* v. *Foust*, *supra*, at 50–51, n. 14, that "punitive damages may be employed to punish unpopular defendants," and noted elsewhere that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). Finally, the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined. Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976).

Because of these considerations, a significant number of American jurisdictions refuse to condone punitive damages awards. See, *e. g.*, *Killibrew* v. *Abbott Laboratories*, 359 So. 2d 1275 (La. 1978); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1 (1891) (Holmes, J.); *Miller* v. *Kingsley*, 194 Neb. 123, 124, 230 N. W. 2d 472, 474 (1975); *Vratsenes* v. *New Hampshire Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Pereira* v. *International Basic Economy Corp.*, 95 P. R. R. 28 (1967); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187

(1968). See also *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884) (no punitive damages at common law). Other jurisdictions limit the amount of punitive damages that may be awarded, for example, to the plaintiff's attorney's fees, see *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 222 A. 2d 220 (1966), or otherwise, *Riggs* v. *Fremont Insurance Co.*, 85 Mich. App. 203, 270 N. W. 2d 654 (1978).

Nonetheless, a number of States do permit juries to award punitive damages in certain circumstances. Historically, however, there has been little uniformity among the standards applied in these States for determining on what basis a jury might award punitive damages. See, *e. g.*, Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1283, and n. 135 (1976); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 52–53 (1982) ("the law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms"); *Duckett* v. *Pool*, 34 S. C. 311, 325, 13 S. E. 542, 547 (1891); *Lynd* v. *Picket*, 7 Minn. 184, 200 (1862).

One fundamental distinction is essential to an understanding of the differences among the various standards for punitive damages. Many jurisdictions have required some sort of wrongful motive, actual intention to inflict harm or intentional doing of an act known to be unlawful—"express malice," "actual malice," "bad faith," "wilful wrong" or "ill will."[3]

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[3] See the cases cited in n. 12, *infra*. Decisions handed down at the time the 42d Congress deliberated leave little question that when a court required a showing of malice in order to recover punitive damages, an inquiry into the actual mental state of the defendant—his motives, intentions, knowledge, or design—was required. The Court reasons that, when used in connection with punitive damages, "malice" really meant something akin to recklessness. The cases simply do not support the claim. The term "malice" often was prefaced with the qualifiers "actual" or "express." See, *e. g.*, *Barlow* v. *Lowder*, 35 Ark. 492, 496 (1880); *Barnett* v. *Reed*, 51 Pa. 190, 191 (1865); *Boardman* v. *Goldsmith*, 48 Vt.

Other States, however, have permitted punitive damages awards merely upon a showing of very careless or negligent conduct by the defendant—"gross negligence," "reck-

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403, 407, 411 (1875); *Ogg* v. *Murdock*, 25 W. Va. 139, 146–147 (1884). When it was not, the context in which it was used virtually always makes it completely clear that an inquiry into the actual intentions and motives of the defendant was required before punitive damages could be awarded. See, *e. g.*, *Brewer* v. *Watson*, 65 Ala. 88, 96–97 (1880); *Kelly* v. *McDonald*, 39 Ark. 387, 393 (1882); *Davis* v. *Hearst*, 160 Cal. 143, 163–164, 116 P. 530, 539–540 (1911) ("malice of evil motive"); *Huber* v. *Teuber*, 10 D. C. 484, 489–491 (1871); *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116, 124–125 (1871); *Curl* v. *Chicago, R. I. & P. R. Co.*, 63 Iowa 417, 428–429, 19 N. W. 308 (1884); *Lynd* v. *Picket*, 7 Minn. 184 (1862); *Carli* v. *Union Depot, Street R. & T. Co.*, 32 Minn. 101, 104, 20 N. W. 89, 90 (1884); *Winter* v. *Peterson*, 24 N. J. L. 524, 529 (1854); *Haines* v. *Schultz*, 50 N. J. L. 481, 484–485, 14 A. 488, 489 (1888); *Causee* v. *Anders*, 20 N. C. 246, 248 (1839); *Windham* v. *Rhame*, 11 S. C. L. 283 (1858). And, even standing alone, the term generally was understood to require inquiry into the defendant's mental state: "In malicious injuries, the injurer foresees the specific evil result and wills it either explicitly or implicitly; in negligent injuries he may foresee a probable danger and may rashly risk the consequences, without being chargeable with a malicious intent." F. Wharton, Law of Negligence § 15 (1874).

Of course, there was a "technical," 19 American and English Encyclopedia of Law 623 (2 ed. 1901), definition of the term that had little to do with actual ill will, but which permitted such a mental state to be presumed from the mere occurrence of an injury. This virtually never was the basis for an award of punitive damages: if it had been, such damages would have been available in every tort action, which never was the rule in any jurisdiction. The Court does not seriously argue otherwise.

Moreover, malice was often the standard employed in jury instructions. *E. g.*, *Hays* v. *Anderson*, 57 Ala. 374 (1876); *Coleman & Newsome* v. *Ryan*, 58 Ga. 132, 134 (1877); *Jeffersonville R. Co.* v. *Rogers*, *supra; Lynd* v. *Picket*, *supra; Morely* v. *Dunbar*, 24 Wis. 183 (1869). There is not the slightest question that a jury of lay persons would have understood the phrase as requiring actual ill will, desire to injure, or other improper motive on the part of the defendant. "Malice" was defined by a dictionary published at the approximate time § 1983 was enacted as "extreme enmity of heart; a disposition to injure others unjustly for personal gratification or from a spirit of revenge; spite; deliberate mischief." Stormonth's English Dictionary 584 (1885). See also Webster's Dictionary 804 (1869); Worcester's Dictionary 873 (1860); 2 Abbott's Law Dictionary 72 (1879) ("a maliglessness," or "extreme carelessness."[4] In sharp contrast to the first set of terms noted above, which connote a requirement of actual ill will towards the plaintiff, these latter phrases import only a degree of negligence. This distinction between

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nant design of evil . . . is the idea attached to the word in popular use"). In short, the available authorities demonstrate that for purposes of punitive damages at the time of the 42d Congress, "malice" imported an actual ill will, intent, or improper motive requirement.

In a few cases decided roughly contemporaneously with the enactment of § 1983, the terms "wanton" and "willful" were used, together with other phrases, to define the proper standard for an award of punitive damages. The Court finds little "ambiguity or confusion" surrounding these terms, and concludes that they clearly indicate a "recklessness" standard. The cases and commentators disagree. As one treatise flatly states: "[T]he term 'wanton' has no peculiar legal signification. It has various meanings, depending on the connection in which it is used." 40 Cyclopedia of Law and Procedure 292–293 (1912). The "connection in which ['wanton'] is used," *ibid.*, in punitive damages cases virtually always reveals that the word was merely an alternative phrasing of the evil motive requirement. See, *e. g.*, *Pike* v. *Dilling*, 48 Me. 539 (1861); *Wilkinson* v. *Drew*, 75 Me. 360, 363 (1883); *Devine* v. *Rand*, 38 Vt. 621 (1866); *Boutwell* v. *Marr*, 71 Vt. 1, 11, 42 A. 607, 610 (1899). In the few cases where context does not make clear what was meant by "wanton," several considerations suggest that it was likely that an inquiry into the motives and intentions of the defendant was intended. As a general proposition, when used in criminal contexts, wanton meant that "the act done is of a wilful, wicked purpose." 30 American and English Encyclopedia of Law 3 (2d ed. 1905). In deciding whether to impose the "quasi-criminal" punishment of punitive damages, this meaning likely would have been that intended by courts using the phrase.

Moreover, as used in a jury instruction—as occasionally was the case, see, *e. g.*, *Jeffersonville R. Co.* v. *Rogers*, *supra*, at 124–125; *Pike* v. *Dilling*, *supra*—the term would have been understood by laymen to require some sort of evil or dissolute intention. See Stormonth's English Dictionary 1146 (1885); Webster's Dictionary 1490 (1869); Worcester's Dictionary 1645 (1860). "Wantonly" most frequently was defined as "lewdly" which in turn was regarded as synonymous with "wickedly." Webster's Dictionary 768 (1869); Worcester's Dictionary 834 (1860). The Court's claim that decisions predicating punitive damages on wantonness reflected a recklessness standard is unfounded. The word had no fixed meaning,

[Footnote 4 is on p. 64]

acts that are intentionally harmful and those that are very negligent, or unreasonable, involves a basic difference of kind, not just a variation of degree. W. Prosser, Law of Torts § 34, p. 185 (4th ed. 1971); Restatement (Second) of

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and decisions using it must be examined individually; to the extent the phrase did have a common meaning, it was, particularly in the context of punitive sanctions, one implying some sort of bad intent.

Likewise, the Court's conclusion regarding the meaning of decisions using the phrase "willful" is unduly simplified. Like "wanton," the phrase had no fixed meaning, 29 American and English Encyclopedia of Law 114–117 (1895); for the meaning intended in a particular context, reference must be had to the decisions at issue, see n. 12, *infra*. If one must generalize, criminal law again is useful, given the "quasi-criminal" character of punitive damages: "the word, as ordinarily used, means not merely voluntarily, but with bad purpose," 29 American and English Encyclopedia of Law 114 (1895). Even more important, however, is the fact that "willful" seldom, if ever, was an independent standard; rather, "willful injury" or "willfully illegal conduct" were the typical contexts in which the phrase appeared. As to these, even apart from the surrounding language of the punitive damages decisions, it was clear that "[t]o constitute wilful injury there must be design, purpose, intent to do wrong and inflict the injury." 30 American and English Encyclopedia of Law 536 (2d ed. 1905). And, of course, a "willful trespass" or other misdeed meant an intentionally wrongful act. *Id.*, at 525–529. Thus, in jurisdictions using the term "willfully," the question generally was whether the defendant knowingly and intentionally harmed the plaintiff, or, alternatively, intentionally committed an act he knew to be tortious or unlawful. In both these cases, inquiry into the wrongful motive of the defendant plainly was demanded; of course, recklessness does not satisfy this requirement.

The Court's discussion of the term "willful negligence" is of little relevance to the common-law standard for punitive damages. The phrase seldom was used, particularly in the punitive damages context, and when it was, it justifiably encountered vigorous criticism. As one court remarked, the phrase "willful neglect" made as much sense as "guilty innocence." *Kelly* v. *Malott*, 135 F. 74 (CA7 1905). Faced with what appeared to be a self-contradictory term, the likely reaction of juries, courts, and Members of the 42d Congress would have been to focus on the unequivocal intent and malice requirements common at the time. In short, whatever general statements may have been made in some treatises regarding "wanton" and "willful," in determining the meaning of the terms in this context, a more careful inquiry is demanded. As the foregoing discussion and the cases discussed *infra* demonstrate, that inquiry makes it clear that the Court's

Torts § 500, Comment *f* (1965). The former typically demands inquiry into the actor's subjective motive and purpose, while the latter ordinarily requires only an objective determination of the relative risks and advantages accruing to society from particular behavior. See *id.*, § 282.

The importance of this distinction is reflected in what one court, speaking not many years before the time § 1983 was enacted, said:

> "[I]n morals, and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly from a worthy motive, and one committing the same act from a wanton and malignant spirit, and with a corrupt and wicked design." *Simpson* v. *McCaffrey*, 13 Ohio 508, 522 (1844).

The Ohio court, applying this distinction, held that punitive damages could only be awarded where some "evil motive"

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recklessness standard was seldom used at the time of the enactment of § 1983.

[4] "Recklessness" generally was defined as "heedlessness" or "negligence," while synonyms included "careless." Stormonth's English Dictionary 832 (1885). In strict legal terms, recklessness is conduct somewhat more dangerous—and therefore unreasonable—than merely negligent conduct, see Restatement (Second) of Torts § 500 (1965); despite this distinction, it is plain that recklessness is different from intentionally harmful conduct not just in this type of degree, but in kind, *ibid.*, Comment *f*.

Undoubtedly, the recklessness or objective unreasonableness of particular conduct will be evidence of the intent of the actor, see n. 8, *infra*. This point has been recognized by commentators on the subject. In 1 J. Sutherland, Law of Damages (1882), for example, the author states the general rule that "[t]here is . . . a marked difference legally, as there is practically, between a tort committed with and without malice; between a wrong done in the assertion of a supposed right, and one wantonly committed . . . ." *Id.*, at 716. The author, however, also observed that "such recklessness or negligence *as evinces* malice or conscious disregard of the rights of others," will support a punitive damages award. *Id.*, at 724 (emphasis added). It is a far different thing to say, as Sutherland does, that the defendant's recklessness is relevant to ascertaining ill will than it is to say, as the Court does, that this lack of care *itself* justifies punitive damages.

was involved. *Ibid.* Oliver Wendell Holmes identified precisely the same distinction between intentionally injurious conduct and careless conduct:

> "Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. [E]ven a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881).[5]

It is illuminating to examine the Court's reasoning with this distinction in mind.

II

At bottom, this case requires the Court to decide when a particular remedy is available under § 1983. Until today, *ante*, at 34–35, n. 2, the Court has adhered, with some fidelity, to the scarcely controversial principle that its proper role in interpreting § 1983 is determining what the 42d Congress intended. That § 1983 is to be interpreted according to this basic principle of statutory construction, 2A C. Sands, Sutherland on Statutory Construction § 45.05 (4th ed. 1972), is clearly demonstrated by our many decisions relying upon the plain language of the section. See, *e. g.*, *Parratt* v. *Taylor*, 451 U. S. 527, 534 (1981); *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980); *Owen* v. *City of Independence*, 445 U. S. 622, 635 (1980). The Court's opinion purports to pursue an inquiry into legislative intent, yet relies heavily upon state-court decisions decided well after the 42d Congress adjourned, see *ante*, at 48, n. 13. I find these cases unilluminating, at least in part because I am unprepared to attribute to the 42d Congress the truly extraordinary foresight that the Court seems to think it had. The reason our earlier decisions interpreting § 1983 have relied upon common-law decisions is simple: Members of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its Members. The decisions of state courts decided well after 1871, while of some academic interest, are largely irrelevant to what Members of the 42d Congress intended by way of a standard for punitive damages.

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[5] The same point was made in *Wise* v. *Daniel*, 221 Mich. 229, 233, 190 N. W. 746, 747 (1922), where the court wrote:

"If a cow kicks a man in the face, the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage. If a man employs spite and venom in administering a physical hurt, he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong."

See also *Inman* v. *Ball*, 65 Iowa 543, 546, 22 N. W. 666, 668 (1885) ("To warrant a jury in inflicting damages by way of punishment, it should appear that the act complained of was a willful or malicious wrong. . . . This is a very different state of mind and purpose from that of a person who has no more than good reason to believe his act is wrongful").

In an apparent attempt to justify its novel approach to discerning the intent of a body that deliberated more than a century ago, the Court makes passing reference to our decisions relating to common-law immunities under § 1983. These decisions provide no support for the Court's analysis, since they all plainly evidence an attempt to discern the intent of the 42d Congress, albeit indirectly, by reference to the common-law principles known to Members of that body. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), one of our earliest immunity decisions, we phrased the question whether legislators were immune from actions under § 1983 as follows:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity?" *Id.*, at 376.

More recently, in *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981), we said:

> "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Likewise, our other decisions with respect to common-law immunities under § 1983 clearly reveal that our consideration of state common-law rules is only a device to facilitate determination of congressional intent.[6] Decisions from the

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[6] See also *Briscoe* v. *LaHue*, 460 U. S. 325, 337, 345 (1983) ("[N]o evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions," and "[i]n 1871, common-law immunity for witnesses was well settled"); *Imbler* v. *Pachtman*, 424 U. S. 409, 417–418 (1976) ("*Tenney* squarely presented the issue of whether the Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials"); *Procunier* v. *Navarette*, 434 U. S. 555, 561 (1978) ("Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials"); *Carey* v. *Piphus*, 435 U. S. 247, 255 (1978) ("The Members of the Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to many lawyers in Congress in 1871"); *Wood* v. *Strickland*, 420 U. S. 308, 316–318 (1975) (relying upon common-law tradition).

Our decision in *Pierson* v. *Ray*, 386 U. S. 547, 553–554 (1967), was based squarely on an attempt to determine what the 42d Congress intended in enacting § 1983. Chief Justice Warren wrote: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872)." Similarly, our decision in *Imbler* v. *Pachtman*, *supra*, 1970's, relied on by the Court, are almost completely irrelevant to this inquiry into legislative intent.

III

The Court also purports to rely on decisions, handed down in the second half of the last century by this Court, in drawing up its rule that mere recklessness will support an award of punitive damages. In fact, these decisions unambiguously support an actual-malice standard. The Court rests primarily on *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859), a diversity tort action against a railroad. There, we initially observed that in "certain actions of tort," punitive damages might be awarded, and then described those actions as "[w]henever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity." *Id.*, at 214. As discussed previously, n. 3, *supra*, it was relatively clear at the time that "malice" required a showing of actual ill will or intent to injure. Perhaps foreseeing future efforts to expand the rule, however, we hastened to specify the type of malice that would warrant punitive damages: "the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of *was conceived in the spirit of mischief, or of criminal indifference to civil obligations.*" 21 How., at 214 (emphasis added). It would have been difficult to have more clearly expressed the "actual malice" standard. We explicitly rejected an "implied malice" formulation, and then mandated inquiry into the "spirit" in which a defendant's act was "conceived."

The Court does not address the requirement, explicitly set forth in *Quigley*, that punitive damages depend on the spirit in which an act was conceived. Instead, focusing only on the words "criminal indifference," *ante*, at 41–42, n. 9, the Court

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at 421, was "predicated upon a considered inquiry into the immunity *historically accorded the relevant official at common law* and the interests behind it" (emphasis added).

suggests that the use of this phrase indicates that *Quigley* established no requirement of wrongful intent. This is unlikely. An authority on criminal law in the 1870's wrote:

> "In no one thing does criminal jurisprudence differ more from civil more than in its different doctrine concerning the intent. The law, seeking justice between man and man, frequently holds one to the civil consequences of his act, though he neither intended the act, nor suffered himself to be influenced by an evil mind, producing it unintended . . . . But the different nature of the criminal law admits of no such distinction; for crime proceeds only from a criminal mind . . . .
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> ". . . There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. . . . It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." 1 J. Bishop, Criminal Law §§286–287 (5th ed. 1872).

Of course, as the Court notes, there are crimes based on reckless or negligent conduct; it reasons from this that the "criminality" requirement in *Quigley* is not confined to cases where persons act with wrongful intent. Yet the requirement of "criminal" spirit is far more sensibly interpreted, not as incorporating every possible twist and turn of criminal law, but as reflecting "a principle of our legal system . . . that the essence of an offence is the wrongful intent." 1 Bishop, *supra*, §287. Indeed, the Court's argument proves far too much: if we are to assume that the reference to "criminal indifference" in *Quigley* was meant, as the Court argues, to incorporate every possible mental state that justifies the imposition of criminal sanctions, then punitive damages would be available for simple negligence. Plainly our decision in *Quigley* does not stand for this remarkable proposition.

Even assuming some ambiguity in our decision in *Quigley*, however, the careful discussion of punitive damages in *Day* v. *Woodworth*, 13 How. 363, 371 (1852), dispels any doubts. While the Court dismisses this treatment as "merely . . . a sidelight," *ante*, at 42, n. 9, in *Quigley* we evidently thought otherwise: in addition to citing and relying explicitly on *Day*, see 21 How., at 213–214, we also drew our punitive damages standard from that case. *Ibid*. *Day* made it perfectly clear that punitive damages cannot be awarded absent actual evil motive. It reasoned that punitive damages are predicated on the "malice, wantonness, oppression, or outrage of the defendant's conduct," and stated the following standard:

> "In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, *had the injury been inflicted without design or intention*, something further by way of punishment or example." 13 How., at 371 (emphasis added).

Elsewhere in *Day* we explained that punitive damages are awarded because of "moral turpitude or atrocity." *Ibid*. It is obvious from these references that we understood the terms "malice" and "wantonness" as requiring that a defendant have acted with evil purposes or intent to do injury. It was with this understanding of the phrases in question that the *Quigley* Court framed its rule, and with this background, any fair reading of that decision could not avoid the conclusion that the Court intended to create an actual-malice requirement.

Our decisions following 1871 indicate yet more clearly that we adhered to an actual-malice or intent-to-injure requirement in punitive damages actions. In *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U. S. 489 (1876), a verdict against a railroad in a diversity action was reversed because the jury was erroneously charged that it might award punitive damages on a finding of "gross negligence." The *Arms* Court first expressed reservations regarding the entire doctrine of punitive damages, remarking that since "the question of intention is always material in an action of tort" in fixing compensatory damages, permitting punitive damages based on the same element posed the threat of double recovery. Nonetheless, acknowledging that the remedy had been approved in *Day* and *Quigley*, the Court concluded that the rule set forth in those decisions should be followed. After quoting the passage in *Quigley*, discussed above, rejecting an implied-malice and adopting an actual-intent-to-injure standard, the Court said:

> "[The rule permitting punitive damages is] applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless *it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them*. . . . The tort is aggravated by *the evil motive, and on this rests the rule of exemplary damages*." 91 U. S., at 493 (emphasis added).

Read in context, this language strongly suggests that an actual-malice standard was intended. The rule of exemplary damages "rests" on a defendant's "evil motive," and, while "reckless indifference" may justify some awards of punitive damages, it may do so only in "that" class of "reckless indifference . . . which is equivalent to an *intentional violation*" of the plaintiff's rights. *Ibid.* (emphasis added).

This interpretation of the opinion in *Arms* is the only reading that can be squared with the holding of that case.[7] The

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[7] Elsewhere in the *Arms* opinion, the Court stated that an award of punitive damages is available only where there was "some wilful misconduct,

Court held that it was error to give an instruction that "gross negligence" would support a finding of punitive damages. This instruction was condemned because "gross negligence" is "a relative term," and "a word of description, and not of definition." *Id.*, at 495. The Court regarded "gross negligence" as too imprecise and ill-defined a standard to support the extraordinary remedy of punitive damages. Given this, it is more than a little peculiar to read the *Arms* opinion as supporting the recklessness standard embraced by the Court.

A leading authority on the law of torts has written that there "is often no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence . . . ." W. Prosser, Law of Torts § 34, p. 185 (4th ed. 1971); see also n. 3, *supra*. Given the virtual identity of the two standards, a Court that held that "gross negligence" was too imprecise a standard to warrant a punitive damages award would not likely have intended its dicta to be read as adopting "recklessness" as an alternative standard. In contrast, a standard of culpability demanding inquiry into the wrongful mental state of the defendant—"evil motive,"

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or that entire want of care which would raise the presumption of a *conscious* indifference to consequences." 91 U. S., at 495 (emphasis added). The Court notes the problems in transforming "indifference . . . into intent," *ante*, at 43–44, n. 10, without confronting the equally difficult task of transforming "conscious[ness]" into inadvertence. Plainly, the question whether a defendant was "conscious" of a certain fact demands inquiry into his subjective mental state, not merely an objective determination of the reasonableness of his conduct. As others have observed: "When willfullness enters, negligence steps out. The former is characterized by advertence, and the latter by inadvertence." *Christy* v. *Butcher*, 153 Mo. App. 397, 401, 134 S. W. 1058, 1059 (1911). Yet, on reflection, the *Arms* formulation need not be regarded as self-contradictory: reckless and negligent conduct may be considered, and are highly probative, in determining whether to award punitive damages. They serve, however, as evidence of "willful misconduct," "evil motive," or a *conscious* choice to impose known injury on another, not as the standard for liability itself.

"conceived in the spirit of mischief, or of criminal indifference," or "design or intention" to do injury—is different in kind, not just degree, from the "very careless" standard explicitly rejected by the *Arms* Court. This standard is a significant step away from the "relative" and ill-defined terms of "description" that the Court thought so unsatisfactory; it seems obvious that the *Arms* Court meant to take just such a step.

Moreover, the meaning of the *Arms* decision was made abundantly clear in a case decided the same day *Arms* was handed down. In *Western Union Telegraph Co.* v. *Eyser*, 91 U. S. 495 (1876), the Court reversed a decision of the Supreme Court of the Territory of Colorado holding that on "no view of the evidence was the court below justified in instructing the jury that exemplary damages could be recovered." The Reporter of Decisions explained: "The [defendant's] omission to . . . give some other proper warning . . . was an act of negligence, entitling the plaintiff to compensatory damages. But there was nothing to authorize the jury to consider the omission as *wilful:* on the contrary, the evidence rebuts every presumption that there was *any intentional wrong.*" *Id.*, at 496 (emphasis added).[8] The defendant in the case, who left electrical wires strung several feet above the ground across a city street in Denver without any real warning, may well have been reckless; certainly, as in fact occurred, a jury could have reached this conclusion. But this was irrelevant: in order to recover punitive damages an "intentional wrong" is what was needed.

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[8] This Court's understanding of the term "willfully" was clearly stated in *Felton* v. *United States*, 96 U. S. 699, 702 (1878), where, in an action to recover a $1,000 penalty from a distiller, the Court said: "Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent . . . ." Likewise, it quoted with approval from a Massachusetts decision stating that "wilfully" ordinarily means "not merely 'voluntarily,' but with a bad purpose." *Ibid.* See also n. 3, *supra.*

Perhaps, by minute dissection of stray clauses in a few of the foregoing decisions, combined with a studied refusal to confront the plain intent underlying phrases like "evil motive," "design and intention," and "intentional wrong," one could discern some shadowy rule of liability resting on recklessness. *Ante*, at 39–48. Ninety years ago, however, the Court, after an exhaustive analysis of the foregoing decisions, explicitly and unambiguously reached precisely the opposite conclusion. In *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101 (1893), the Court considered whether punitive damages were properly awarded against a railroad in a diversity action. The Court noted that the law on the subject was "well-settled," *id.*, at 107, and paraphrased the *Quigley* standard: The jury may award punitive damages "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." 147 U. S., at 107. Then, as it had in *Day* and *Arms*, the Court explained this formulation, observing that a "*guilty intention* on the part of the defendant is *required* in order to charge him with exemplary or punitive damages." 147 U. S., at 107 (emphases added). In addition, the Court quoted, with plain approval, the following statements of the New Jersey Supreme Court in *Haines* v. *Schultz*, 50 N. J. L. 481, 484, 14 A. 488, 489 (1888): "The right to award [punitive damages] rests primarily upon the single ground—wrongful motive. . . . It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." 147 U. S., at 110. The Court went on to note that "criminal intent [is] necessary to warrant the imposition of [punitive] damages," *id.*, at 111, and elsewhere wrote that "wanton, malicious or oppressive intent" and "unlawful and criminal intent," were required for the award of such damages. *Ibid.*; *id.*, at 114. *Prentice* simply leaves no question that actual wrongful intent, not just recklessness, was required for a recovery of punitive damages, and, in addition, that this was what "well-settled" law always had required.[9]

And, once again, in *Scott* v. *Donald*, 165 U. S. 58, 86 (1897), we made it completely clear that actual malice was a prerequisite to a recovery of punitive damages. In *Scott*, we held that a complaint alleging a constitutional tort stated facts sufficient to support a claim for punitive damages. In so holding we carefully analyzed our prior decisions respecting punitive damages beginning with *Day* and continuing through *Prentice*. We repeated and applied the "well-settled" rule contained in those cases: "Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by *evil motive, actual malice, deliberate violence or oppression.*" 165 U. S., at 86 (emphasis added). The point could not be clearer. The Court today fashions a federal standard for punitive damages, see 42 U. S. C. § 1988 (1976 ed., Supp. V), yet steadfastly refuses to follow those of our decisions speaking to that point. If it did, it would adopt a standard requiring "evil motive, actual malice, deliberate violence or oppression." *Ibid.*

In addition, the decisions rendered by state courts in the years preceding and immediately following the enactment of § 1983 attest to the fact that a solid majority of jurisdictions took the view that the standard for an award of punitive damages included a requirement of ill will.[10] To be sure, a few jurisdictions followed a broader standard; a careful review of the decisions at the time uncovers a number of decisions

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[9] The Court does not attempt to explain the unequivocal and repeated statements in *Prentice* regarding the necessity of showing "guilty intention." It relies instead on the Court's quotation from a state case that observed in passing that punitive damages have been assessed on "evidence of such willfullness, recklessness or wickedness . . . as amounted to criminality." 147 U. S., at 115. Not only is this statement at best ambiguous, but the Court mentioned the state case only in its discussion of principles of *respondeat superior*, not in its earlier discussion of the standard for punitive damages.

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[10] Legal treatises in use in the 1870's do not support the majority's assertion that punitive damages could be awarded on a showing of gross negligence, recklessness, or serious indifference to the rights of others. Instead, they support the rather unsurprising proposition that among the courts of the several States in the late 1870's, several views regarding punitive damages had evolved. Addison's Treatise on the Law of Torts says "in all cases of *malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct*, juries are told to give what are called exemplary damages." 2 C. Addison, Law of Torts 645 (1876) (emphasis added). The treatise continues: "Wherever the wrong or injury is of a grievous nature, done with a high hand, or is accompanied with deliberate intention to injure, or with words of contumely and abuse, and by circumstances of aggravation, the jury" may award punitive damages. *Ibid.* In a footnote Addison indicates that "malice" has been interpreted in several ways, including "an intention to set at defiance the legal rights of others," "wantonness or a willful disregard of the rights of others," "such a wanton character that it might properly be said to be willful," and "a disregard for the rights of others." *Id.*, at 646–647, n. 1. Plainly, as discussed in greater detail below, different States applied different rules, and that is all the treatise writer purported to say.

A similar pattern is followed in other hornbooks popular at the time. The authors make reference to some decisions articulating an actual-ill-will standard, while citing as well to decisions accepting a recklessness rule. Compare J. Deering, Law of Negligence § 415, text accompanying n. 1 (1886), with *id.*, at text accompanying n. 7; G. Field, Law of Damages § 78 (1876) ("The rule we have furnished not only requires that the act done should be injurious, and that actual loss be sustained thereby to the plaintiff, but also that it be willfully injurious. The *animus* of the wrongdoer is an important question to be considered in such cases, as it is in criminal cases. The wrong must be intended, and the result of a spirit of mischief, wantonness, or of criminal indifference to civil obligations, or the rights of others, from which malice may well be inferred"), with *id.*, § 84, at 91, n. 4 (gross negligence applied in an Iowa case); F. Hilliard, Law of Remedies for Torts 598–599 (2d ed. 1873) (detailing different standards prevailing); 2 S. Thompson, Law of Negligence 1264–1265 (1880) (noting conflicting views regarding intent requirement).

Moreover, Professor Greenleaf, one of the most respected legal commentators of his time, entirely denied the existence of any doctrine of punitive that contain some reference to "recklessness." And equally clearly, in more recent years many courts have adopted a standard including "recklessness" as the minimal degree of culpability warranting punitive damages.[11]

Most clear of all, however, is the fact that at about the time § 1983 was enacted a considerable number of the 37 States

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damages. 2 S. Greenleaf, Law of Evidence § 253 (15th ed. 1892). While his view has prevailed in a substantial minority of American jurisdictions, see *supra*, in many States it concededly has not been followed. Its importance for our purposes, however, lies in the fact that it was the considered judgment of a respected scholar, published and available at the time § 1983 was enacted. Likewise, in 1 J. Sutherland, Law of Damages (1882), the author notes that "bad motive" is necessary for an award of punitive damages, while permitting such a motive to be inferred from proof of negligent or reckless conduct. *Id.*, at 716, 724. Similarly, Judge Mayne's Treatise on Damages, indicated that the applicable standard for an award of punitive damages required some sort of improper motive. J. Mayne, Law of Damages 41 (1856).

[11] See the cases cited by the Court, *ante*, at 48, n. 13. In this regard, it is useful to consider a position commonly held in 1871, and not infrequently followed today. A number of States adhered to the requirement that actual ill will towards a victim was the standard for punitive damages, but permitted jurors to infer this mental state from the character of the tortfeasor's conduct. *E. g.*, *Malone* v. *Murphy*, 2 Kan. 250, 263 (1864) (jury "may infer malice from want of probable cause, but they are not bound so to infer it"); *Lyon* v. *Hancock*, 35 Cal. 372, 376 (1868) ("Malice . . . is generally to be inferred from facts and circumstances"); *Farwell* v. *Warren*, 51 Ill. 467, 472 (1869) ("actuated by malice" which may be inferred from "wanton, willful or reckless disregard"); *Addair* v. *Huffman*, 156 W. Va. 592, 195 S. E. 2d 739 (1973); *Columbus Finance, Inc.* v. *Howard*, 42 Ohio St. 2d 178, 327 N. E. 2d 654 (1975). As one lower court described it, "fraud, oppression or malice" are necessary to recover punitive damages, but these elements "may be inferred from acts constituting such gross negligence as to warrant the inference of or be deemed equivalent to an evil intent." *Schuman* v. *Chatman*, 184 Okla. 224, 227, 86 P. 2d 615, 618 (1938). It is important to appreciate, however, that there is a fundamental distinction between the *standard* for punitive damages and the *evidence the jury may rely upon in meeting that standard.* To say that reckless behavior may, with other evidence, permit the jury to infer a particular mental state, is not to say, as the Court does, that reckless behavior alone satisfies the punitive damages claimant's standard of proof.

then belonging to the Union required some showing of wrongful intent before punitive damages could be awarded.[12] As the cases set out in the margin reveal, it is but a statement of the obvious that "evil motive" was the general standard for punitive damages in many States at the time of the 42d Congress.

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[12] See, *e. g.*, *Roberts* v. *Heim*, 27 Ala. 678, 683 (1855) ("the law allows [punitive damages] whenever the trespass is committed in a rude, aggravating, or insulting manner, as malice may be inferred from these circumstances"); *Brewer* v. *Watson*, 65 Ala., at 96–97 ("it is clear . . . that where [a public] officer acts in good faith, he is not liable to exemplary damages"; "there can clearly be no recovery of exemplary . . . damages, without proof of" acts committed "maliciously, and with intent to injure"); *Hays* v. *Anderson*, 57 Ala., at 378; *Barlow* v. *Lowder*, 35 Ark., at 496 (instruction that "exemplary damages [are] allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression" held a "textbook principle"); *Kelly* v. *McDonald*, 39 Ark., at 393 ("Exemplary damages ought not to be given, unless in cases of intentional violation of another's right, or when a proper act is done with an excess of force or violence, or with a malicious intent to injure another in his person or property"); *Ward* v. *Blackwood*, 41 Ark. 295, 299–301 (1883) (emphasis added) (punitive damages denied because "there was no evidence of previous malice, nor of deliberate cruelty, only of hot blood and a *certain recklessness*"; charge requiring "a wanton and willful manner, and under circumstance of outrage, cruelty and oppression, or with malice" approved); *Dorsey* v. *Manlove*, 14 Cal. 553, 558 (1860) (holding that absence of "bad faith," "wanton or malicious motives," or "willfully unjust or oppressive" conduct barred punitive damages; reference in dicta to "reckless disregard" not applied); *Nightingale* v. *Scannell*, 18 Cal. 315, 325 (1861); *Lyon* v. *Hancock*, *supra; Davis* v. *Hearst*, 160 Cal., at 163–164, 116 P., at 539–540 ("malice of evil motive" necessary to recover punitive damages in California); *Doroszka* v. *Lavine*, 111 Conn. 575, 150 A. 692 (1930) (reviewing cases limiting punitive damages to amount of attorney's fees); *Dibble* v. *Morris*, 26 Conn. 416, 426–427 (1857) ("settled" that jury can award "vindictive [damages] in proportion to the degree of malice or wantonness evinced by the defendant"); *Welch* v. *Durand*, 36 Conn. 182 (1869) (special rule for ultrahazardous activities); *Dalton* v. *Beers*, 38 Conn. 529 (1871); *Huber* v. *Teuber*, 10 D. C., at 489–491 (punitive damages "are sometimes allowable . . . as punishment of a quasi-criminal character for the wantonness and malice which inspired the wrong of the defendant"; "malignant motives" and "improper motive" required); *Yahoola River Mining Co.* v. *Irby*, 40 Ga. 479, 482 (1869) ("*bona fide* belief" by defendant that he was acting lawfully bars punitive damages); *Green* v. *Southern Express Co.*, 41 Ga. 515 (1871) (jury charge requiring "a desire to injure the accused" approved);

Coleman & Newsome v. *Ryan*, 58 Ga., at 134, 135 (instruction that jury might award "vindictive damages, if they believed that the conduct of [the defendant] was malicious, and for the purpose of breaking up plaintiff's business"); *Jeffersonville R. Co.* v. *Rogers*, 38 Ind., at 124–125 (charge requiring "the spirit of oppressive malice or wantonness" approved); *Moore* v. *Crose*, 43 Ind. 30, 34–35 (1873) (punitive damages award reversed since "[t]here [were] no elements of malice, insult, or deliberate oppression in the case . . . [and] appellant was acting under the belief that he had a valid right"); *Thomas* v. *Isett*, 1 Greene 470, 475 (Iowa 1848) ("wanton, rude, and aggravating manner, indicating malice or a desire to injure," needed for punitive damages); *Frink & Co.* v. *Coe*, 4 Greene 555, 559 (Iowa 1854) (special rule for common carriers); *Brown* v. *Allen*, 35 Iowa 306, 311 (1872) (instruction that malice-in-law would support punitive damages reversed; "This was clearly erroneous. It is an abrogation of the distinction between a simple trespass and its consequences, and a malicious one justifying exemplary damages. A simple trespass, because unlawful, might be, under the instruction, visited with punitive damages, however honestly the defendants may have believed they had the lawful right to take possession of the property in question"); *Fuller* v. *Chicago & N. W. R. Co.*, 31 Iowa 187, 204 (1871); *Curl* v. *Chicago, R. I. & P. R. Co.*, 63 Iowa, at 428–429, 19 N. W. 308 (instruction permitting punitive damages if defendant "willfully used unnecessary force" held improper: "This instruction is erroneous in that it does not make the recovery of exemplary damages dependent upon malice of the wrong doer. It holds that the willful use of unnecessary force is a ground for allowing exemplary damages. An act willfully done may not be accompanied by malice, *that is, a spirit of enmity, malevolence or ill will, with a desire to harm and a disposition to injure*"); *Inman* v. *Ball*, 65 Iowa, at 465, 22 N. W., at 668 (Rothrock, J.) ("To warrant a jury in inflicting damages by way of punishment, it should appear that the act complained of was a willful or malicious wrong. *There must be a purpose or intent to harass, oppress, or injure another. This is a very different state of mind and purpose from that of a person who has no more than good reason to believe his act is wrongful*"); *Wentworth* v. *Blackman*, 71 Iowa 255, 256–257, 32 N. W. 311, 311–312 (1887) (Rothrock, J.) (reversing award of punitive damages; "malicious act," which demands inquiry into defendant's "motives," required); *Cameron* v. *Bryan*, 89 Iowa 214, 56 N. W. 434 (1893) (Rothrock, J.) ("willful and malicious" conduct necessary); *Stinson* v. *Buisson*, 17 La. 567, 572 (1841) ("redress in damages should . . .

In short, a careful examination of the decisions available to the Members of the 42d Congress reveals a portrait different in important respects from that painted by the Court. While

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be proportioned to the injury sustained, unless it be where they are given as an example to deter others from similar conduct in future, and really for the purpose of punishing men for their bad motives and intentions"); *Biggs* v. *D'Aquin Bros.*, 13 La. Ann. 21, 22 (1858) (no punitive damages awardable against party acting in "good faith"); *Wilkinson* v. *Drew*, 75 Me., at 363 (while punitive damages are recoverable "in case as well as trespass," to recover them jury must find "that the act or omission of the defendant was willful and wanton," with "wantonly" explicitly defined as "indicating wicked intent"); *Pike* v. *Dilling*, 48 Me., at 543 (court approves instruction that punitive damages are awardable if defendant acted "wantonly," quoting statement requiring that defendant acted "'under the influence of actual malice, or with the intention to injure the plaintiff'"); *Schindel* v. *Schindel*, 12 Md. 108, 122–123 (1858) ("The man who, from bad and malicious intentions, commits a trespass, ought, in justice, to be dealt with more harshly than one who acts from no vicious feelings, but ignorantly"); *Baltimore & Ohio R. Co.* v. *Blocher*, 27 Md. 277, 287 (1867); *Zimmerman* v. *Helser*, 32 Md. 274, 278 (1869) (no punitive damages unless the defendant acts by "mere *pretence* for the purpose of perpetrating a wrong"); *Friend* v. *Hamill*, 34 Md. 298, 304–307, 314 (1870) ("malice, ill-will or corruption" necessary for punitive damages); *Ellis* v. *Brockton Publishing Co.*, 198 Mass. 538, 542, 84 N. E. 1018, 1019 (1908) (punitive damages have not been and are not recoverable); *Hyatt* v. *Adams*, 16 Mich. 180, 198–199 (1867) (refusal to charge that "if from the evidence no evil motive be imputed to the defendant, then the rule of compensation is fixed by law, and . . . exemplary damages are not allowable," reversed); *Goetz* v. *Ambs*, 27 Mo. 28, 32–33 (1858) ("[I]ntention . . . only becomes material in considering the question of exemplary damages. If the injury is not intentional, but results simply from a want of proper care, nothing more should be recovered than will compensate for the actual damage. . . . [But if] wilfulness—a wrongful act, done intentionally . . ." exists, punitive damages are available); *McKeon* v. *Citizens' R. Co.*, 42 Mo. 79, 87 (1867) (neither recklessness nor gross negligence supports punitive damages, which "can be given, if ever in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done"); *Lynd* v. *Picket*, 7 Minn., at 201 (instruction that if defendants, knowing plaintiff's property "to be exempt, wilfully and maliciously attached [it with] the purpose of harassing and oppressing" him, then punitive damages are awardable explicitly approved as indicating "the facts necessary to be proved in order to justify [the jury] in a few jurisdictions may have adopted a more lenient, if less precise, standard of recklessness, the majority's claim that the prevailing standard in 1871 was one of recklessness sim-

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giving exemplary damages"; "malice" includes acts defendant "know[s]" are "wrong and unlawful"); *Carli* v. *Union Depot, Street R. & T. Co.*, 32 Minn., at 104, 20 N. W., at 90 (punitive damages "properly awarded only where the trespass appears to have been wanton, willful, or malicious,—a *conscious* violation of the [plaintiff's] rights"); *Whitfield* v. *Whitfield*, 40 Miss. 352, 366–367 (1866) (punitive damages require "malice, fraud, oppression, or wilful wrong"; no punitive damages if defendant "acts in good faith, and with no intent injuriously to affect plaintiff's rights"); *Memphis & Charleston R. Co.* v. *Whitfield*, 44 Miss. 466, 488 (1870) (actual-intent rule "modified somewhat in . . . application, particularly to passenger carriers by steam"); *Fay* v. *Parker*, 53 N. H. 342 (1872) (no prior decision adopts rule of punitive damages; doctrine rejected entirely); *Winter* v. *Peterson*, 24 N. J. L., at 529 (if official acted "not only . . . without authority, but maliciously, he was liable to exemplary damages"; "maliciously" means "from improper motives"); *Haines* v. *Schultz*, 50 N. J. L. 481, 484–485, 14 A. 488–489 (1888) (punitive damages "res[t] primarily on a single ground—wrongful motive. . . . [I]t is the wrongful personal intention to injure that calls forth the penalty"; "punitive damages res[t] upon a wrongful motive of the defendant"); *King* v. *Patterson*, 49 N. J. L. 417, 419–420, 9 A. 705, 706 (1887) (while "malice" may not always mean actual ill will, when awarding punitive damages "malicious motive was required"); *Causee* v. *Anders*, 20 N. C., at 248 (punitive damages proper where defendant was "actuated by malice and a total disregard of the laws"); *Louder* v. *Hinson*, 49 N. C. 369, 371 (1857) (charge requiring desire "to wreak their vengeance" on the plaintiffs and "harass and insult them" approved); *Roberts* v. *Mason*, 10 Ohio St. 277, 279–280 (1859); *Simpson* v. *McCaffrey*, 13 Ohio 508, 522 (1884) (punitive damages available "for the wicked, corrupt, and malignant motive and design, which prompted [the guilty party] to the wrongful act"); *Rayner* v. *Kinney*, 14 Ohio St. 283, 287 (1863) (exemplary damages are "a punishment which should only attach to a wrongful intention. [W]here no wrongful intention is found, there is no just ground for the punishment of the defendant"); *Barnett* v. *Reed*, 51 Pa., at 191, 196 (instruction that, absent "actual malice or design to injure, the rule is compensatory damages; but where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages," termed "unexceptionable"); *M'Cabe* v. *Morehead*, 1 Watts & Serg. 513, 516 (Pa. 1841); *Herdic* v. *Young*, 55 Pa. 176, 177 (1867); *McDevitt* v. *Vial*, 7 Sadler 585, 590, 11 A. 645, 648–649 (Pa. 1887) (charge requiring "a high handed spirit, and a disply cannot be sustained. The decisions of this Court, which were likely well known to federal legislators, supported an *animus* requirement. As we said in *Day* v. *Woodworth*, 13

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position to oppress and do wrong" approved); *Herreshoff* v. *Tripp*, 15 R. I. 92, 94, 23 A. 104, 105 (1885) (punitive damages "only when the defendant has acted maliciously or in bad faith"); *Windham* v. *Rhame*, 11 S. C. L., at 285–287 (where evidence "show[s] a malicious motive . . . damages may be awarded not only to recompense the plaintiff but to punish the defendant"; jury must "ascertain if the act be the result of accident or negligence, or of deliberate and evil purpose," and in latter instance, where injury results from "malfeasance," "an amount beyond the pecuniary loss should be given, by way of punishment"; "motive," "malicious purpose," and "intention" dispositive; statement that punitive damages require showing that defendant "malevolently with a view to harass, vex and insult the plaintiff" quoted with approval); *Cole* v. *Tucker*, 6 Tex. 266, 268 (1851) (punitive damages if "fraud, malice, or wilful wrong" or "a desire to injure" exist); *Neill* v. *Newton*, 24 Tex. 202, 204 (1859) (failure to allege "aggravated circumstances of misrepresentation and deception" bars punitive damages); *Bradshaw* v. *Buchanan*, 50 Tex. 492, 494 (1878) (punitive damages award reversed because "there is no evidence tending to show that appellants were actuated by malice . . . or that they [acted] wantonly, or with the intent to vex, harass, injure, or oppress him. On the contrary, the evidence strongly tends to show that they were actuated by no such motive"); *Parsons* v. *Harper*, 57 Va. 64, 78 (1860) (dictum; if an "act were done without malice, the party might not be liable to exemplary and vindictive damages"); *Virginia Railway & Power Co.* v. *House*, 148 Va. 879, 886, 193 S. E. 480, 482 (1927) ("well settled" law requires reversing punitive damages award because there was no evidence of "any malicious or willful wrong"); *Borland* v. *Barrett*, 76 Va. 128 (1882) (punitive damages no different from compensatory damages in Virginia); *Devine* v. *Rand*, 38 Vt., at 626 (emphasis added) (Since punitive damages "depen[d] *entirely* upon the character and purpose of the defendant's acts, the usual evidence must be admissible to ascertain the disposition and intention which prompted them"; punitive damages depend on "wickedness and wilfullness"); *Lombard* v. *Batchelder*, 58 Vt. 558, 559–560, 5 A. 511, 512 (1886) ("malicious," "improper," and "evil" motive necessary); *Boutwell* v. *Marr*, 71 Vt., at 11, 42 A., at 610 ("wanton desire to injure"); *Earl* v. *Tupper*, 45 Vt. 275, 287–288 (1873) (after discussing rule in some States, court holds that punitive damages are "to be governed wholly by the malice or wantonness of the defendant"); *Hoadley* v. *Watson*, 45 Vt. 289, 292 (1873) (punitive damages available "on account of the bad spirit and wrong intention of the

How. 363 (1852), and *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859), a "spirit of mischief" was necessary for an award of punitive damages. Among the States,

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defendant"); *Boardman* v. *Goldsmith*, 48 Vt., at 407, 411 (instruction requiring that defendant "acted with express malice, intending to injure or disgrace the plaintiff" approved); *Ogg* v. *Murdock*, 25 W. Va., at 146–147 (approves, as "correct rule," statement "when . . . there is no actual malice or design to injure, the rule is to allow compensatory damages; but when actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages"; holds "there being no proof of an intent to injure and oppress the plaintiff, the jury were not authorized to find that the defendant was actuated by malice and consequently they were not justified in giving vindictive damages"); *McWilliams* v. *Bragg*, 3 Wis. 424, 431 (1854) ("where . . . injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice" punitive damages available); *Barnes* v. *Martin*, 15 Wis. *240, *245 (1862) (punitive damages not awardable "unless the jury should find that the acts [of the defendant] were without apparent cause, and proceeded from wanton or malicious motives"); *Morely* v. *Dunbar*, 24 Wis. 183, 186–187 (1869) (charge requiring "aggravation, insult, or cruelty, with vindictiveness or malice" approved; "malice" and "motive" are basis for punitive damages); *Hooker* v. *Newton*, 24 Wis. 292, 293 (1869) (approving charge requiring malice and intent to injure); *Hamlin* v. *Spaulding*, 27 Wis. 360, 364 (1870) (defendant must act "in bad faith, and, if not with actual malice, at least for the purpose of serving some ulterior object outside of the administration of criminal justice"); *Pickett* v. *Crook*, 20 Wis. 358 (1866) (not followed outside context of failure to control vicious animals); *Topolewski* v. *Plankinton Packing Co.*, 143 Wis. 52, 70, 126 N. W. 554, 560 (1910) ("the court has uniformly held that punitory damages are not allowable at all without the element of malice[;] the defendant [must have] acted with bad intent of some sort").

The Court's treatment of law prevailing in 1871 relies principally upon state-court decisions from the 1880's and 1890's. These cases are admittedly somewhat more relevant to what the 42d Congress intended than the 20th-century cases cited by the Court; particularly if they explain prior decisions, these cases may reflect a well-settled understanding in a particular jurisdiction of the law regarding punitive damages. Yet, decisions handed down well after 1871 are considerably *less* probative of legislative intent than decisions rendered before or shortly subsequent to the enactment of § 1983: it requires no detailed discussion to demonstrate that a Member of the 42d Congress would have been more influenced by a decision from 1870 than by one from the 1890's. Accordingly, the bulk of the cases cited by there were many approaches to the imposition of punitive damages, with a variety of standards prevailing throughout the Nation. Nonetheless, a solid majority of jurisdictions followed the rule that punitive damages require some element of "evil motive," "wickedness," or "formed design to injure and oppress." Thus, if we are to adhere to the principle, consistently followed in our previous decisions, that the Members of the 42d Congress intended § 1983 to reflect existing common-law rules, it is very likely that wrongful *animus* was a prerequisite for an award of punitive damages.

IV

Even apart from this historical background, I am persuaded by a variety of additional factors that the 42d Congress intended a "wrongful intent" requirement. As mentioned above, punitive damages are not, and never have been, a favored remedy. In determining whether Congress, not bound by *stare decisis*,[13] would have embraced this often-condemned doctrine, it is worth considering the judgment of one of the most respected commentators in the field regarding the desirability of a legislatively enacted punitive damages remedy: "It is probable that, in the framing of a model code of damages to-day for use in a country unhampered by

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the Court must be ignored; they simply illustrate the historical shift in legal doctrine, pointed out in text, from an actual-intent standard to a recklessness standard. If the Court is serious in its attention to 19th-century law, analysis must focus on the common law as it stood at the time of the 42d Congress. Here, notwithstanding the Court's numerous attempts to explain why decisions do not mean what they plainly say, it remains clear that in a majority of jurisdictions actual malice was required in order to recover punitive damages.

[13] In 1864 the Kansas Supreme Court, although bound by prior precedent, agreed with Professor Greenleaf's condemnation of punitive damages, see n. 10, *supra*, and said "were the question an open one, we should be inclined to [compensation only]." *Malone* v. *Murphy*, 2 Kan., at 261. See also *Sullivan* v. *Oregon Railway & Navigation Co.*, 12 Ore. 392, 7 P. 508 (1885).

legal tradition, the doctrine of exemplary damages would find no place." C. McCormick, Law of Damages 276 (1935).

In deciding whether Congress heeded such advice, it is useful to consider the language of § 1983 itself—which should, of course, be the starting point for any inquiry into legislative intent. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party *injured* in an action at law, suit in equity, or other proper proceeding *for redress*" (emphasis added).

Plainly, the statutory language itself provides absolutely no support for the cause of action for punitive damages that the Court reads into the provision. Indeed, it merely creates "liab[ility] to the party injured . . . for redress." "Redress" means "[r]eparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this." 8 Oxford English Dictionary 310 (1933). And, as the Court concedes, punitive damages are not "reparation" or "compensation"; their very purpose is to punish, not to compensate. If Congress meant to create a right to recover punitive damages, then it chose singularly inappropriate words: both the reference to injured parties and to redress suggests compensation, and not punishment.

Other statutes roughly contemporaneous with § 1983 illustrate that if Congress wanted to subject persons to a punitive damages remedy, it did so explicitly. For example, in § 59, 16 Stat. 207, Congress created express punitive damages remedies for various types of commercial misconduct. Likewise, the False Claims Act, § 5, 12 Stat. 698, provided a civil remedy of double damages and a $2,000 civil forfeiture penalty for certain misstatements to the Government. As one

Court of Appeals has remarked: "Where Congress has intended [to create a right to punitive damages] it has found no difficulty in using language appropriate to that end." *United Mine Workers* v. *Patton*, 211 F. 2d 742, 749 (CA4 1954). And yet, in § 1983 one searches in vain for some hint of such a remedy.[14]

In the light of the foregoing indications, it is accurate to say that the foundation upon which the right to punitive damages under § 1983 rests is precarious, at the best. Given the extraordinary diffidence and obliqueness with which the right was granted—if it was—it seems more than a little unusual to read that grant as incorporating the most expansive of the available views as to the standard for punitive damages. Given the legislative ambiguity, the sensible approach to the problem would be an honest recognition that, if we are to infer a right to punitive damages, it should be a restrained one, reflecting the Legislature's approach in creating the right. And surely, the right ought to be limited by the view of punitive damages that the Members of the 42d Congress would have had—not by what some state courts have done a century later.

An intent requirement, unlike a recklessness standard, is logically consistent with the underlying justification for *punitive* damages. It is a fundamental principle of American law that penal consequences generally ought to be imposed only where there has been some sort of wrongful *animus* creating the type of culpability warranting this treatment. As we said in *Morissette* v. *United States*, 342 U. S. 246, 250–251 (1952): "A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.'" This principle "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.*, at 250. Indeed, as indicated previously, 19th-century decisions consistently justified the imposition of a quasi-criminal "fine" by reference to the "wickedness" or "evil" conduct of the defendant, just as Oliver Wendell Holmes drew a sharp distinction between accidentally and intentionally kicking an animal. Given that punitive damages are meant to punish, it is difficult to believe that Congress would have departed from the "instinctive," "universal and persistent" linkage in our law between punishment and wrongful intent.

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[14] I agree with the Court's conclusion that the Act of May 31, 1870, § 2, 16 Stat. 140, is "revealing." That statute, like § 1983, was a Reconstruction civil rights statute. It created a private cause of action for persons suffering from racial discrimination in voting registration, and explicitly allowed recovery of a $500 civil penalty by the person aggrieved. Similar provision for recovery of punitive damages is conspicuously absent from § 1983. Likewise, the Act clearly conditions the award of damages on a knowing violation of the civil rights laws. It is difficult to see what comfort the Court derives from the section. It merely demonstrates that when Congress wished to impose punitive damages on a party, it did so explicitly, and, even then, required more than recklessness.

V

Finally, even if the evidence of congressional intent were less clearcut, I would be persuaded to resolve any ambiguity in favor of an actual-malice standard. It scarcely needs repeating that punitive damages are not a "favorite of the law," see *supra*, at 58, owing to the numerous persuasive criticisms that have been leveled against the doctrine. The majority reasons that these arguments apply to all awards of punitive damages, not just to those under § 1983; while this is of course correct, it does little to reduce the strength of the arguments, and, if they are persuasive, we should not blindly follow the mistakes other courts have made.

Much of what has been said above regarding the failings of a punitive damages remedy is equally appropriate here. It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like "reckless indifference" gives free reign to the biases and prejudices of juries. In short, there are persuasive reasons not to create a new punitive damages remedy unless it is clear that Congress so intended.

This argument is particularly powerful in a case like this, where the uncertainty resulting from largely random awards of punitive damages will have serious effects upon the performance by state and local officers of their official duties.[15] One of the principal themes of our immunity decisions is that the threat of liability must not deter an official's "willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U. S. 232, 240 (1974). To avoid stifling the types of initiative and decisiveness necessary for the "government to govern," *Dalehite* v. *United States*, 346 U. S. 15, 57 (1953) (Jackson, J., dissenting), we have held that officials will be liable for compensatory damages only for certain types of conduct. Precisely the same reasoning applies to liability for punitive damages. Because punitive damages generally are not subject to any relation to actual harm suffered, and because the recklessness standard is so imprecise, the remedy poses an even greater threat to the ability of officials to take decisive, efficient action. After the Court's decision, governmental officials will be subjected to the possibility of damages awards unlimited by any harm they may have caused or the fact they acted with unquestioned good faith: when swift action is demanded, their thoughts likely will be on personal financial consequences that may result from their conduct—but whose limits they cannot predict—and not upon their official duties. It would have been difficult for the Court to have fashioned a more effective Damoclean sword than the open-ended, standardless, and unpredictable liability it creates today.[16]

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[15] This is not a new concern, see, *e. g.*, *Brewer* v. *Watson*, 65 Ala., at 96–97 (absent an actual-malice standard for punitive damages "few men, fit for such positions, could be induced to accept public trusts of this character").

Moreover, notwithstanding the Court's inability to discern them, there are important distinctions between a right to

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[16] The Court relies all but exclusively on the notion that a recklessness standard for punitive damages is necessary to deter unconstitutional conduct by state officials. The issue is a little more complicated. The deterrence the Court pursues necessarily is accompanied by costs: as our decisions regarding common-law immunities explicitly recognize, see cases cited in n. 6, *supra*, the imposition of personal liability on officials gravely threatens their initiative and judgment, and scarcely serves to make public positions attractive to competent, responsible persons. While constitutional rights are high on our scale of values, so is an effective performance of the countless basic functions that modern governments increasingly have come to perform. In fashioning a punitive damages standard we should seek to achieve that level of deterrence that is most worth the costs it imposes.

The Court, however, simply ignores the potential costs of the standard it embraces. This single-minded desire to deter unconstitutional official actions would not logically stop at recklessness; awarding punitive damages on the basis of mere negligence, or on a strict liability basis, might result, in the short term, in even less unconstitutional conduct. Yet, just as with the Court's recklessness standard, this deterrence would come at too costly a price. The Court is unable to give any reason, related to achieving deterrence at a cost sensibly related to benefits obtained, for its choice of a recklessness standard. It offers no response to the obvious distinctions between the standard for punitive damages in state-law tort actions and that in § 1983 actions, where § 1988 provides attorney's fees and where issues of federalism are involved. It does not even attempt to discuss the plainly relevant question whether insurance may be obtained against punitive damages awards.

While fully recognizing that the issue is a complex one, in my judgment the dangers that accompany the vague recklessness standard adopted by the Court far outweigh the deterrence achieved thereby. Recklessness too easily shades into negligence, particularly when the defendant is an unpopular official—whether because of his official actions, or for more invidious reasons. Punitive damages are not bound by a measure of actual damages, so when a jury does act improperly, the harm it may occasion can be great. These threats occur in an area—the provision of governmental damages under § 1983 and a similar right under state tort law. A leading rationale seized upon by proponents of punitive damages to justify the doctrine is that "the award is . . . a covert response to the legal system's overt refusal to provide financing for litigation." D. Dobbs, Law of Remedies 221 (1973); K. Redden, Punitive Damages § 2.4(C) (1980). Yet, 42 U. S. C. § 1988 (1976 ed., Supp. V) provides not just a "covert response" to plaintiffs' litigation expenses but an explicit provision for an award to the prevailing party in a § 1983 action of "a reasonable attorney's fee as part of the costs." By permitting punitive damages *as well as* attorney's fees, § 1983 plaintiffs, unlike state tort law plaintiffs, get not just one windfall but two—one for them, and one for their lawyer. This difference between the incentives that are present in state tort actions, and those in § 1983 actions, makes the Court's reliance upon the standard for punitive damages in the former entirely inapposite: in fashioning a new financial lure to litigate under § 1983 the Court does not act in a vacuum, but, by adding to existing incentives, creates an imbalance of inducements to litigate that may have serious consequences.[17]

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services—where it is important to have efficient, competent public servants. I fear that the Court's decision poorly serves this goal, and that in the end, official conduct will be less useful to our citizens, not better.

[17] In this respect, Congress' attitude towards punitive damages as revealed by its treatment of the subject in the Civil Rights Act of 1968 is highly illuminating. There, in marked contrast to § 1983, Congress explicitly included a right to punitive damages; notably, however, that right was limited to recoveries of $1,000. 42 U. S. C. § 3612(c). While Congress may have thought punitive damages appropriate in some cases, it recognized the dangers that such a remedy creates—unfairness to defendants, stifling of initiative of state officials, comity concerns, and, perhaps most alarmingly, an open-ended incentive to litigate in a field where other such incentives already exist. See, *e. g.*, 42 U. S. C. § 1988 (1976 ed., Supp. V).

Petitioner did not argue, and the Court properly does not decide, whether the $1,000 limit in 42 U. S. C. § 3612(c), also should apply in actions under § 1983. It seems likely that it would. While the Court does not say so, its opinion seems to derive its punitive damages remedy from

The staggering effect of § 1983 claims upon the workload of the federal courts has been decried time and again. The torrent of frivolous claims under that section threatens to incapacitate the judicial system's resolution of claims where true injustice is involved; those claims which truly warrant redress are in a very real danger of being lost in a sea of meritless suits. Yet, apparently oblivious to this, the Court today reads into the silent, inhospitable terms of § 1983 a remedy that is designed to serve as a "bounty" to encourage private litigation. Dobbs, *supra*, at 221. In a time when the courts are flooded with suits that do not raise colorable claims, in large part because of the existing incentives for litigation under § 1983, it is regrettable that the Court should take upon itself, in apparent disregard for the likely intent of the 42d Congress, the legislative task of encouraging yet more litigation.[18] There is a limit to what the federal judicial system can bear.

"the laws of the United States," concluding *sub silentio* that they "are suitable to carry [§ 1983] into effect." 42 U. S. C. § 1988 (1976 ed., Supp. V). (This follows from the Court's apparent view that, for example, in one of the several States where punitive damages are not available, a § 1983 plaintiff could recover such damages, thus indicating that it is not "the common law . . . of the State wherein the court having jurisdiction of such civil or criminal cause is held," § 1988, that the Court is applying.) If, therefore, we are to apply a punitive damages remedy "in conformity with the laws of the United States," then the most relevant law is 42 U. S. C. § 3612(c), limiting punitive damages in certain civil rights actions to $1,000.

[18] The case is materially different from our decision in *Patsy* v. *Board of Regents*, 457 U. S. 496 (1982), where our previous decisions strongly suggested that exhaustion of state administrative remedies is not required under § 1983. Here, our previous statements as to the standard for a recovery of punitive damages are inconsistent with the Court's formulation. In *Carey* v. *Piphus*, 435 U. S., at 257, n. 11, we implied that the absence of "malicious intention" would preclude an award of punitive damages. And, as discussed above, the standard for punitive damages recoveries in constitutional tort actions was that the case involve "a tort . . . aggravated by evil motive, actual malice, deliberate violence or oppression." *Scott* v. *Donald*, 165 U. S. 58, 86 (1897).

Finally, by unquestioningly transferring the standard of punitive damages in *state* tort actions to *federal* § 1983 actions, the Court utterly fails to recognize the fundamental difference that exists between an award of punitive damages by a federal court, acting under § 1983, and a similar award by a state court acting under prevailing local laws. While state courts may choose to adopt such measures as they deem appropriate to punish officers of the jurisdiction in which they sit, the standards they choose to adopt can scarcely be taken as evidence of what it is appropriate for a federal court to do. See *Edelman* v. *Jordan*, 415 U. S. 651, 677, n. 19 (1974). When federal courts enforce punitive damages awards against local officials they intrude into sensitive areas of sovereignty of coordinate branches of our Nation, thus implicating the most basic values of our system of federalism. Moreover, by yet further distorting the incentives that exist for litigating claims against local officials in federal court, as opposed to state courts, the Court's decision makes it even more difficult for state courts to attempt to conform the conduct of state officials to the Constitution.

I dissent.

JUSTICE O'CONNOR, dissenting.

Although I agree with the result reached in JUSTICE REHNQUIST's dissent, I write separately because I cannot agree with the approach taken by either the Court or JUSTICE REHNQUIST. Both opinions engage in exhaustive, but ultimately unilluminating, exegesis of the common law of the availability of punitive damages in 1871. Although both the Court and JUSTICE REHNQUIST display admirable skills in legal research and analysis of great numbers of musty cases, the results do not significantly further the goal of the inquiry: to establish the intent of the 42d Congress. In interpreting § 1983, we have often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. See, *e. g.*, *Newport* v. *Fact Con-*

certs, Inc., 453 U. S. 247, 258 (1981); *Carey* v. *Piphus*, 435 U. S. 247, 255 (1978). This approach makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly in a case like this one, in which those interpreting the common law of 1871 must resort to dictionaries in an attempt to translate the language of the late 19th century into terms that judges of the late 20th century can understand, see *ante*, at 39–41, n. 8; 61–64, nn. 3, 4, and in an area in which the courts of the earlier period frequently used inexact and contradictory language, see *ante*, at 45–47, n. 12, we cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions. The battle of the string citations can have no winner.

Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying § 1983 to determine which rule best accords with those policies. In *Fact Concerts*, we identified the purposes of § 1983 as pre-eminently to compensate victims of constitutional violations and to deter further violations. 453 U. S., at 268. See also *Robertson* v. *Wegmann*, 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus*, *supra*, at 254–257, and n. 9. The conceded availability of compensatory damages, particularly when coupled with the availability of attorney's fees under § 1988, completely fulfills the goal of compensation, leaving only deterrence to be served by awards of punitive damages. We must then confront the close question whether a standard permitting an award of unlimited punitive damages on the basis of recklessness will chill public officials in the performance of their duties more than it will deter violations of the Constitution, and whether the availability of punitive damages for reckless violations of the Constitution in addition to attorney's fees will create a incentive to bring an ever-increasing flood of § 1983 claims, threatening the ability of the federal courts to handle those that are meritorious. Although I cannot concur in JUSTICE REHNQUIST's wholesale condemnation of awards of punitive damages in any context or with the suggestion that punitive damages should not be available even for intentional or malicious violations of constitutional rights, I do agree with the discussion in Part V of his opinion of the special problems of permitting awards of punitive damages for the recklessness of public officials. Since awards of compensatory damages and attorney's fees already provide significant deterrence, I am persuaded that the policies counseling against awarding punitive damages for the recklessness of public officials outweigh the desirability of any incremental deterrent effect that such awards may have. Consequently, I dissent.

CITY OF LOS ANGELES *v.* LYONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1064. Argued November 2, 1982—Decided April 20, 1983

Respondent filed suit in Federal District Court against petitioner City of Los Angeles and certain of its police officers, alleging that in 1976 he was stopped by the officers for a traffic violation and that although he offered no resistance, the officers, without provocation or justification, seized him and applied a "chokehold," rendering him unconscious and causing damage to his larynx. In addition to seeking damages, the complaint sought injunctive relief against petitioner, barring the use of chokeholds except in situations where the proposed victim reasonably appeared to be threatening the immediate use of deadly force. It was alleged that, pursuant to petitioner's authorization, police officers routinely applied chokeholds in situations where they were not threatened by the use of any deadly force; that numerous persons had been injured as a result thereof; that respondent justifiably feared that any future contact he might have with police officers might again result in his being choked without provocation; and that there was thus a threatened impairment of various rights protected by the Federal Constitution. The District Court ultimately entered a preliminary injunction against the use of chokeholds under circumstances that did not threaten death or serious bodily injury. The Court of Appeals affirmed.

Held:

1. The case is not rendered moot even though while it was pending in this Court, city police authorities prohibited use of a certain type of chokehold in any circumstances and imposed a 6-month moratorium on the use of another type of chokehold except under circumstances where deadly force was authorized. The moratorium by its terms was not permanent, and thus intervening events have not irrevocably eradicated the effects of the alleged misconduct. Pp. 100–101.

2. The federal courts are without jurisdiction to entertain respondent's claim for injunctive relief. *O'Shea* v. *Littleton*, 414 U. S. 488; *Rizzo* v. *Goode*, 423 U. S. 362. Pp. 101–113.

(a) To satisfy the "case or controversy" requirement of Art. III, a plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct, and the injury or threat of injury must be "real and immediate," not "conjectural" or "hypothetical." "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, *supra*, at 495–496. Pp. 101–105.

(b) Respondent has failed to demonstrate a case or controversy with petitioner that would justify the equitable relief sought. That respondent may have been illegally choked by the police in 1976, while presumably affording him standing to claim damages against the individual officers and perhaps against petitioner, does not establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer who would illegally choke him into unconsciousness without any provocation. If chokeholds were authorized only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to respondent from petitioner's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that he would either illegally resist arrest or the officers would disobey their instructions and again render him unconscious without any provocation. The equitable doctrine that cessation of the challenged conduct (here the few seconds while the chokehold was being applied to respondent) does not bar an injunction is not controlling, since respondent's lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued. The rule that a claim does not become moot where it is capable of repetition, yet evades review, is likewise inapposite. Pp. 105–110.

(c) Even assuming that respondent's pending damages suit affords him Art. III standing to seek an injunction as a remedy for the claim arising out of the 1976 events, nevertheless the equitable remedy is unavailable because respondent failed to show irreparable injury—a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again. Nor will respondent's injury allegedly suffered in 1976 go unrecompensed; for that injury he has an adequate damages remedy at law. Recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of irreparable injury which is both great and immediate. Pp. 111–113.

656 F. 2d 417, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 113.

Frederick N. Merkin argued the cause for petitioner. With him on the briefs were *Ira Reiner* and *Lewis N. Unger*.

Michael R. Mitchell argued the cause for respondent. With him on the brief were *Fred Okrand* and *Charles S. Sims*.*

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether respondent Lyons satisfied the prerequisites for seeking injunctive relief in the Federal District Court.

I

This case began on February 7, 1977, when respondent, Adolph Lyons, filed a complaint for damages, injunction, and declaratory relief in the United States District Court for the Central District of California. The defendants were the City of Los Angeles and four of its police officers. The complaint alleged that on October 6, 1976, at 2 a. m., Lyons was stopped by the defendant officers for a traffic or vehicle code violation and that although Lyons offered no resistance or threat whatsoever, the officers, without provocation or justification, seized Lyons and applied a "chokehold"[1]—either

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*Briefs of *amici curiae* urging reversal were filed by *Robert J. Logan* for the City of San Jose, California, et al.; by *Myron L. Dale* for the National Association of Chiefs of Police et al.; by *Benjamin L. Brown, J. Lamar Shelley, James B. Brennan, Henry W. Underhill, Jr., Roy D. Bates, George Agnost, Roger F. Cutler, John Dekker, Lee E. Holt, George F. Knox, Jr., Walter M. Powell, William H. Taube, Aaron A. Wilson, John W. Witt, Max P. Zall, Conard B. Mattox, Jr.*, and *Charles S. Rhyne* for the National Institute of Municipal Law Officers; and by *George J. Franscell, Wayne W. Schmidt*, and *Courtney E. Evans* for the Los Angeles Police Protective League et al.

[1] The police control procedures at issue in this case are referred to as "control holds," "chokeholds," "strangleholds," and "neck restraints." All these terms refer to two basic control procedures: the "carotid" hold and the "bar arm" hold. In the "carotid" hold, an officer positioned behind a subject places one arm around the subject's neck and holds the wrist of that arm with his other hand. The officer, by using his lower forearm and bicep muscle, applies pressure concentrating on the carotid arteries located

the "bar arm control" hold or the "carotid-artery control" hold or both—rendering him unconscious and causing damage to his larynx. Counts I through IV of the complaint sought damages against the officers and the City. Count V, with which we are principally concerned here, sought a preliminary and permanent injunction against the City barring the use of the control holds. That count alleged that the City's police officers, "pursuant to the authorization, instruction and encouragement of Defendant City of Los Angeles, regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever," that numerous persons have been injured as the result of the application of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that Lyons "justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse." Lyons alleged the threatened impairment of rights protected by the First, Fourth, Eighth, and Fourteenth Amendments. Injunctive relief was sought against the use of the control holds "except in situations where the proposed victim of said control reasonably appears to be threatening the immediate use of deadly force." Count VI sought declaratory relief against the City, *i. e.*, a judgment that use of the chokeholds absent the threat of immediate use of deadly force is a *per se* violation of various constitutional rights.

The District Court, by order, granted the City's motion for partial judgment on the pleadings and entered judgment for

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on the sides of the subject's neck. The "carotid" hold is capable of rendering the subject unconscious by diminishing the flow of oxygenated blood to the brain. The "bar arm" hold, which is administered similarly, applies pressure at the front of the subject's neck. "Bar arm" pressure causes pain, reduces the flow of oxygen to the lungs, and may render the subject unconscious.

the City on Counts V and VI.[2] The Court of Appeals reversed the judgment for the City on Counts V and VI, holding over the City's objection that despite our decisions in *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), and *Rizzo* v. *Goode*, 423 U. S. 362 (1976), Lyons had standing to seek relief against the application of the chokeholds. *Lyons* v. *City of Los Angeles*, 615 F. 2d 1243 (1980). The Court of Appeals held that there was a sufficient likelihood that Lyons would again be stopped and subjected to the unlawful use of force to constitute a case or controversy and to warrant the issuance of an injunction, if the injunction was otherwise authorized. We denied certiorari. 449 U. S. 934 (1980).

On remand, Lyons applied for a preliminary injunction. Lyons pressed only the Count V claim at this point. See n. 6, *infra*. The motion was heard on affidavits, depositions, and government records. The District Court found that Lyons had been stopped for a traffic infringement and that without provocation or legal justification the officers involved had applied a "Department-authorized chokehold which resulted in injuries to the plaintiff." The court further found that the department authorizes the use of the holds in situations where no one is threatened by death or grievous bodily harm, that officers are insufficiently trained, that the use of the holds involves a high risk of injury or death as then employed, and that their continued use in situations where neither death nor serious bodily injury is threatened "is unconscionable in a civilized society." The court concluded that such use violated Lyons' substantive due process rights under the Fourteenth Amendment. A preliminary injunction was entered enjoining "the use of both the carotid artery and bar arm holds under circumstances which do not threaten death or serious bodily injury." An improved training program and regular reporting and recordkeeping were also ordered.[3] The Court of Appeals affirmed in a brief *per curiam* opinion stating that the District Court had not abused its discretion in entering a preliminary injunction. 656 F. 2d 417 (1981). We granted certiorari, 455 U. S. 937 (1982), and now reverse.

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[2] The order also gave judgment for the City on Count II insofar as that Count rested on the First and Eighth Amendments, as well as on Count VII, which sought a declaratory judgment that the City Attorney was not authorized to prosecute misdemeanor charges. It appears from the record on file with this Court that Counts III and IV had previously been dismissed on motion, although they reappeared in an amended complaint filed after remand from the Court of Appeals.

II

Since our grant of certiorari, circumstances pertinent to the case have changed. Originally, Lyons' complaint alleged that at least two deaths had occurred as a result of the application of chokeholds by the police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May 1982, there had been five more such deaths. On May 6, 1982, the Chief of Police in Los Angeles prohibited the use of the bar-arm chokehold in any circumstances. A few days later, on May 12, 1982, the Board of Police Commissioners imposed a 6-month moratorium on the use of the carotid-artery chokehold except under circumstances where deadly force is authorized.[4]

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[3] By its terms, the injunction was to continue in force until the court approved the training program to be presented to it. It is fair to assume that such approval would not be given if the program did not confine the use of the strangleholds to those situations in which their use, in the view of the District Court, would be constitutional. Because of successive stays entered by the Court of Appeals and by this Court, the injunction has not gone into effect.

[4] The Board of Police Commissioners directed the Los Angeles Police Department (LAPD) staff to use and assess the effectiveness of alternative control techniques and report its findings to the Board every two months. Prior to oral argument in this case, two such reports had been submitted, but the Board took no further action. On November 9, 1982, the Board extended the moratorium until it had the "opportunity to review and evaluate" a third report from the Police Department. Insofar as we are advised, the third report has yet to be submitted.

Based on these events, on June 3, 1982, the City filed in this Court a memorandum suggesting a question of mootness, reciting the facts but arguing that the case was not moot. Lyons in turn filed a motion to dismiss the writ of certiorari as improvidently granted. We denied that motion but reserved the question of mootness for later consideration. 457 U. S. 1115 (1982).

In his brief and at oral argument, Lyons has reasserted his position that in light of changed conditions, an injunctive decree is now unnecessary because he is no longer subject to a threat of injury. He urges that the preliminary injunction should be vacated. The City, on the other hand, while acknowledging that subsequent events have significantly changed the posture of this case, again asserts that the case is not moot because the moratorium is not permanent and may be lifted at any time.

We agree with the City that the case is not moot, since the moratorium by its terms is not permanent. Intervening events have not "irrevocably eradicated the effects of the alleged violation." *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979). We nevertheless hold, for another reason, that the federal courts are without jurisdiction to entertain Lyons' claim for injunctive relief.

III

It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. *Flast* v. *Cohen*, 392 U. S. 83, 94–101 (1968); *Jenkins* v. *McKeithen*, 395 U. S. 411, 421–425 (1969) (opinion of MARSHALL, J.). Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." See, *e. g.*, *Golden* v. *Zwickler*, 394 U. S. 103, 109–110 (1969); *Public Workers* v. *Mitchell*, 330 U. S. 75, 89–91 (1947); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923).

In *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), we dealt with a case brought by a class of plaintiffs claiming that they had been subjected to discriminatory enforcement of the criminal law. Among other things, a county magistrate and judge were accused of discriminatory conduct in various respects, such as sentencing members of plaintiff's class more harshly than other defendants. The Court of Appeals reversed the dismissal of the suit by the District Court, ruling that if the allegations were proved, an appropriate injunction could be entered.

We reversed for failure of the complaint to allege a case or controversy. *Id.*, at 493. Although it was claimed in that case that particular members of the plaintiff class had actually suffered from the alleged unconstitutional practices, we observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.*, at 495–496. Past wrongs were evidence bearing on "whether there is a real and immediate threat of repeated injury." *Id.*, at 496. But the prospect of future injury rested "on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." *Ibid.* The most that could be said for plaintiffs' standing was "that *if* [plaintiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed." *Id.*, at 497. We could not find a case or controversy in those circumstances: the threat to the plaintiffs was not "sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses. . . ." *Id.*, at 496. It was to be assumed that "[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." *Id.*, at 497.

We further observed that case-or-controversy considerations "obviously shade into those determining whether the complaint states a sound basis for equitable relief," *id.*, at 499, and went on to hold that even if the complaint presented an existing case or controversy, an adequate basis for equitable relief against petitioners had not been demonstrated:

> "[Plaintiffs] have failed, moreover, to establish the basic requisites of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. We have already canvassed the necessarily conjectural nature of the threatened injury to which [plaintiffs] are allegedly subjected. And if any of the [plaintiffs] are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged." *Id.*, at 502.

Another relevant decision for present purposes is *Rizzo* v. *Goode*, 423 U. S. 362 (1976), a case in which plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and against city residents in general. The Court reiterated the holding in *O'Shea* that past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy. The claim of injury rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception" of departmental procedures. 423 U. S., at 372. This hypothesis was "even more attenuated than those allegations of future injury found insufficient in *O'Shea* to warrant [the] invocation of federal jurisdiction." *Ibid.* The Court also held that plaintiffs' showing at trial of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief.

Golden v. *Zwickler*, 394 U. S. 103 (1969), a case arising in an analogous situation, is directly apposite. Zwickler sought a declaratory judgment that a New York statute prohibiting anonymous handbills directly pertaining to election campaigns was unconstitutional. Although Zwickler had once been convicted under the statute,[5] his sole concern related to a Congressman who had left the House of Representatives for a place on the Supreme Court of New York and who would not likely be a candidate again. A unanimous Court held that because it was "most unlikely" that Zwickler would again be subject to the statute, no case or controversy of "'sufficient immediacy and reality'" was present to allow a declaratory judgment. *Id.*, at 109. Just as Zwickler's assertion that the former Congressman could be a candidate for Congress again was "hardly a substitute for evidence that this is a prospect of 'immediacy and reality,'" *ibid.*, Lyons' assertion that he may again be subject to an illegal chokehold does not create the actual controversy that must exist for a declaratory judgment to be entered.

We note also our *per curiam* opinion in *Ashcroft* v. *Mattis*, 431 U. S. 171 (1977). There, the father of a boy who had been killed by the police sought damages and a declaration that the Missouri statute which authorized police officers to use deadly force in apprehending a person who committed a felony was unconstitutional. Plaintiff alleged that he had another son, who "'*if* ever arrested or brought under an attempt at arrest on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be *in danger* of being killed by these defendants or other police officers . . . .'" *Id.*, at 172, n. 2. We ruled that "[s]uch speculation is insufficient to establish the existence of a present, live controversy." *Id.*, at 173, n. 2.

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[5] Zwickler's conviction was reversed on state-law grounds. 394 U. S., at 105.

IV

No extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought.[6] Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner. Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy. If, for example, chokeholds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the City's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation.[7]

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[6] The City states in its brief that on remand from the Court of Appeals' first judgment "[t]he parties agreed and advised the district court that the respondent's damages claim could be severed from his effort to obtain equitable relief." Brief for Petitioner 8, n. 7. Respondent does not suggest otherwise. This case, therefore, as it came to us, is on all fours with *O'Shea* and should be judged as such.

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[7] The centerpiece of JUSTICE MARSHALL's dissent is that Lyons had standing to challenge the City's policy because to recover damages he would have to prove that what allegedly occurred on October 6, 1976, was pursuant to city authorization. We agree completely that for Lyons to succeed in his damages action, it would be necessary to prove that what happened to him—that is, as alleged, he was choked without any provocation or legal excuse whatsoever—was pursuant to a city policy. For several reasons, however, it does not follow that Lyons had standing to seek the injunction prayed for in Count V.

First, Lyons alleges in Count II of his first amended complaint that on October 6, 1976, the officers were carrying out official policies of the City. That allegation was incorporated by reference in Count V. That policy, however, is described in paragraphs 20 and 23 of Count V as authorizing the use of chokeholds "in situations where [the officers] are threatened by far less than deadly force." This is not equivalent to the unbelievable assertion that the City either orders or authorizes application of the chokeholds where there is no resistance or other provocation.

Second, even if such an allegation is thought to be contained in the complaint, it is belied by the record made on the application for preliminary injunction.

Under *O'Shea* and *Rizzo*, these allegations were an insufficient basis to provide a federal court with jurisdiction to entertain Count V of the complaint.[8] This was apparently the conclusion of the District Court in dismissing Lyons' claim for injunctive relief. Although the District Court acted without opinion or findings, the Court of Appeals interpreted its action as based on lack of standing, *i. e.*, that under *O'Shea* and *Rizzo*, Lyons must be held to have made an "insufficient showing that the police were likely to do this to the plaintiff again." 615 F. 2d, at 1246. For several reasons—each of them infirm, in our view—the Court of Appeals thought reliance on *O'Shea* and *Rizzo* was misplaced and reversed the District Court.

First, the Court of Appeals thought that Lyons was more immediately threatened than the plaintiffs in those cases since, according to the Court of Appeals, Lyons need only

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Third, even if the complaint must be read as containing an allegation that officers are authorized to apply the chokeholds where there is no resistance or other provocation, it does not follow that Lyons has standing to seek an injunction against the application of the restraint holds in situations that he has not experienced, as for example, where the suspect resists arrest or tries to escape but does not threaten the use of deadly force. Yet that is precisely the scope of the injunction that Lyons prayed for in Count V.

Fourth, and in any event, to have a case or controversy with the City that could sustain Count V, Lyons would have to credibly allege that he faced a realistic threat from the future application of the City's policy. JUSTICE MARSHALL nowhere confronts this requirement—the necessity that Lyons demonstrate that he, himself, will not only again be stopped by the police but will also be choked without any provocation or legal excuse. JUSTICE MARSHALL plainly does not agree with that requirement, and he was in dissent in *O'Shea* v. *Littleton*. We are at issue in that respect.

[8] As previously indicated, *supra*, at 98, Lyons alleged that he feared he would be choked in any future encounter with the police. The reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant. Of course, emotional upset is a relevant consideration in a damages action.

be stopped for a minor traffic violation to be subject to the strangleholds. But even assuming that Lyons would again be stopped for a traffic or other violation in the reasonably near future, it is untenable to assert, and the complaint made no such allegation, that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested regardless of the conduct of the person stopped. We cannot agree that the "odds," 615 F. 2d, at 1247, that Lyons would not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief. We note that five months elapsed between October 6, 1976, and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police.

Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.

Second, the Court of Appeals viewed *O'Shea* and *Rizzo* as cases in which the plaintiffs sought "massive structural" relief against the local law enforcement systems and therefore that the holdings in those cases were inapposite to cases such as this where the plaintiff, according to the Court of Appeals, seeks to enjoin only an "established," "sanctioned" police practice assertedly violative of constitutional rights. *O'Shea* and *Rizzo*, however, cannot be so easily confined to their facts. If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October 1976, then he has not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice.

The Court of Appeals also asserted that Lyons "had a live and active claim" against the City "if only for a period of a few seconds" while the stranglehold was being applied to him and that for two reasons the claim had not become moot so as to disentitle Lyons to injunctive relief: First, because under normal rules of equity, a case does not become moot merely because the complained of conduct has ceased; and second, because Lyons' claim is "capable of repetition but evading review" and therefore should be heard. We agree that Lyons had a live controversy with the City. Indeed, he still has a claim for damages against the City that appears to meet all Art. III requirements. Nevertheless, the issue here is not whether that claim has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum. The equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help in this respect, for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued.

The rule that a claim does not become moot where it is capable of repetition, yet evades review, is likewise inapposite. Lyons' claim that he was illegally strangled remains to be litigated in his suit for damages; in no sense does that claim "evade" review. Furthermore, the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality. *DeFunis* v. *Odegaard*, 416 U. S. 312, 319 (1974). As we have indicated, Lyons has not made this demonstration.

The record and findings made on remand do not improve Lyons' position with respect to standing. The District Court, having been reversed, did not expressly address Lyons' standing to seek injunctive relief, although the City was careful to preserve its position on this question. There was no finding that Lyons faced a real and immediate threat of again being illegally choked. The City's policy was described as authorizing the use of the strangleholds "under circumstances where no one is threatened with death or grievous bodily harm." That policy was not further described, but the record before the court contained the department's existing policy with respect to the employment of chokeholds. Nothing in that policy, contained in a Police Department manual, suggests that the chokeholds, or other kinds of force for that matter, are authorized absent some resistance or other provocation by the arrestee or other suspect.[9] On the contrary, police officers were instructed to use chokeholds only when lesser degrees of force do not suffice and then only "to gain control of a suspect who is violently resisting the officer or trying to escape." App. 230.

Our conclusion is that the Court of Appeals failed to heed *O'Shea*, *Rizzo*, and other relevant authority, and that the District Court was quite right in dismissing Count V.

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[9] The dissent notes that a LAPD training officer stated that the police are authorized to employ the control holds whenever an officer "feels" that there is about to be a bodily attack. *Post*, at 118. The dissent's emphasis on the word "*feels*" apparently is intended to suggest that LAPD officers are authorized to apply the holds whenever they "feel" like it. If there is a distinction between permitting the use of the holds when there is a "threat" of serious bodily harm, and when the officer "feels" or believes there is about to be a bodily attack, the dissent has failed to make it clear. The dissent does not, because it cannot, point to any written or oral pronouncement by the LAPD or any evidence showing a pattern of police behavior that would indicate that the official policy would permit the application of the control holds on a suspect who was not offering, or threatening to offer, physical resistance.

V

Lyons fares no better if it be assumed that his pending damages suit affords him Art. III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a "likelihood of substantial and immediate irreparable injury." *O'Shea* v. *Littleton*, 414 U. S., at 502. The speculative nature of Lyons' claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.

Nor will the injury that Lyons allegedly suffered in 1976 go unrecompensed; for that injury, he has an adequate remedy at law. Contrary to the view of the Court of Appeals, it is not at all "difficult" under our holding "to see how anyone can ever challenge police or similar administrative practices." 615 F. 2d, at 1250. The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there.

Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional. Cf. *Warth* v. *Seldin*, 422 U. S. 490 (1975); *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208 (1974); *United States* v. *Richardson*, 418 U. S. 166 (1974). This is not to suggest that such undifferentiated claims should not be taken seriously by local authorities. Indeed, the interest of an alert and interested citizen is an essential element of an effective and fair government, whether on the local, state, or national level.[10] A federal court, however, is not the proper forum to press such claims unless the requirements for entry and the prerequisites for injunctive relief are satisfied.

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[10] The City's memorandum suggesting a question of mootness informed the Court that the use of the control holds had become "a major civic con-

We decline the invitation to slight the preconditions for equitable relief; for as we have held, recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate. *O'Shea*, *supra*, at 499; *Younger* v. *Harris*, 401 U. S. 37, 46 (1971). *Mitchum* v. *Foster*, 407 U. S. 225 (1972), held that suits brought under 42 U. S. C. § 1983 are exempt from the flat ban against the issuance of injunctions directed at state-court proceedings, 28 U. S. C. § 2283. But this holding did not displace the normal principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities. In exercising their equitable powers federal courts must recognize "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951); *O'Shea* v. *Littleton*, *supra*, at 500. See also *Rizzo* v. *Goode*, 423 U. S., at 380; *Cleary* v. *Bolger*, 371 U. S. 392 (1963); *Wilson* v. *Schnettler*, 365 U. S. 381 (1961); *Pugach* v. *Dollinger*, 365 U. S. 458 (1961). The Court of Appeals failed to apply these factors properly and therefore erred in finding that the District Court had not abused its discretion in entering an injunction in this case.

As we noted in *O'Shea*, 414 U. S., at 503, withholding injunctive relief does not mean that the "federal law will exer-

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troversy" and that in April and May 1982 "a spirited, vigorous, and at times emotional debate" on the issue took place. The result was the current moratorium on the use of the holds.

cise no deterrent effect in these circumstances." If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983. Furthermore, those who deliberately deprive a citizen of his constitutional rights risk conviction under the federal criminal laws. *Ibid.*

Beyond these considerations the state courts need not impose the same standing or remedial requirements that govern federal-court proceedings. The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court, absent far more justification than Lyons has proffered in this case.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The District Court found that the city of Los Angeles authorizes its police officers to apply life-threatening chokeholds to citizens who pose no threat of violence, and that respondent, Adolph Lyons, was subjected to such a chokehold. The Court today holds that a federal court is without power to enjoin the enforcement of the city's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The city is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result. I dissent from this unprecedented and unwarranted approach to standing.

There is plainly a "case or controversy" concerning the constitutionality of the city's chokehold policy. The constitutionality of that policy is directly implicated by Lyons' claim for damages against the city. The complaint clearly alleges that the officer who choked Lyons was carrying out an official policy, and a municipality is liable under 42 U. S. C. § 1983 for the conduct of its employees only if they acted pursuant to such a policy. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694 (1978). Lyons therefore has standing to challenge the city's chokehold policy and to obtain whatever relief a court may ultimately deem appropriate. None of our prior decisions suggests that his requests for particular forms of relief raise any additional issues concerning his standing. Standing has always depended on whether a plaintiff has a "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), not on the "precise nature of the relief sought." *Jenkins* v. *McKeithen*, 395 U. S. 411, 423 (1969) (opinion of MARSHALL, J., joined by Warren, C. J., and BRENNAN, J.).

I

A

Respondent Adolph Lyons is a 24-year-old Negro male who resides in Los Angeles. According to the uncontradicted evidence in the record,[1] at about 2 a. m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.

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[1] The following summary of the evidence is taken from Lyons' deposition and his "Notice of Application and Application for Preliminary Injunction and Declaratory Relief; Points and Authorities," pp. 3–4. Although petitioner's answer contains a general denial of the allegations set forth in the complaint, petitioner has never presented any evidence to challenge Lyons' account. Brief for Petitioner 8.

On February 7, 1977, Lyons commenced this action under 42 U. S. C. § 1983 against the individual officers and the city, alleging violations of his rights under the Fourth, Eighth, and Fourteenth Amendments to the Constitution and seeking damages and declaratory and injunctive relief. He claimed that he was subjected to a chokehold without justification and that defendant officers were "carrying out the official policies, customs and practices of the Los Angeles Police Department and the City of Los Angeles." Count II, ¶ 13.[2] These allegations were included or incorporated in each of the Counts in which the city was named as a defendant. See Counts II through VI. Lyons alleged that the city authorizes the use of chokeholds "in innumerable situations where [the police] are not threatened by the use of any deadly force whatsoever." Count V, ¶ 22.

B

Although the city instructs its officers that use of a chokehold does not constitute deadly force, since 1975 no less than 16 persons have died following the use of a chokehold by an LAPD police officer. Twelve have been Negro males.[3] The evidence submitted to the District Court[4] established that for many years it has been the official policy of the city to permit police officers to employ chokeholds in a variety of situations where they face no threat of violence. In reported "altercations" between LAPD officers and citizens the chokeholds are used more frequently than any other means of physical restraint.[5] Between February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations.[6]

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[2] Count I of the first amended complaint also stated a claim against the individual officers for damages. ¶ 8.

It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death. Chokeholds are intended to bring a subject under control by causing pain and rendering him unconscious. Depending on the position of the officer's arm and the force applied, the victim's voluntary or involuntary reaction, and his state of health, an officer may inadvertently crush the victim's larynx, trachea, or hyoid. The result may be death caused by either cardiac arrest or asphyxiation.[7] An LAPD officer described the reaction of a person to being choked as "do[ing] the chicken,"

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[3] Thus in a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds. In addition to his other allegations, Lyons alleged racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. ¶¶ 10, 15, 23, 24, 25, 30.

Of the 16 deaths, 10 occurred prior to the District Court's issuance of the preliminary injunction, although at that time the parties and the court were aware of only 9. On December 24, 1980, the Court of Appeals stayed the preliminary injunction pending appeal. Four additional deaths occurred during the period prior to the grant of a further stay pending filing and disposition of a petition for certiorari, 453 U. S. 1308 (1981) (REHNQUIST, J., in chambers), and two more deaths occurred thereafter.

[4] Lyons' motion for a preliminary injunction was heard on affidavits, depositions, and government records.

[5] Statement of Officer Pascal K. Dionne (officer-in-charge of the Physical Training and Self-Defense Unit of the LAPD), App. 240–241.

[6] Statement of Officer Pascal K. Dionne, *id.*, at 259. These figures undoubtedly understate the frequency of the use of chokeholds since, as Officer Dionne, a witness for the city, testified, the figures compiled do not include all altercations between police officers and citizens. *Id.*, at 241. Officer Dionne's statement does not define "altercation" and does not indicate when "altercation reports" must be filed by an officer.

The city does not maintain a record of injuries to suspects.

The physiological effects of the chokeholds were described as follows by Dr. A. Griswold, an expert in pathology (*id.*, at 364–367):

"From a medical point of view, the bar arm control is extremely dangerous in an unpredictable fashion. Pressure from a locked forearm across the neck sufficient to compress and close the trachea applied for a sufficient period of time to cause unconsciousness from asphyxia must, to an anatomical certainty, also result in . . . a very high risk of a fractured hyoid bone or crushed larynx. The risk is substantial, but at the same time, unpredictable.

"It depends for one thing on which vertical portion of the neck the forearm pressure is exerted. . . .

"Another factor contributing to unpredictability is the reaction of the victim. . . . [The] pressure exerted in a bar arm control . . . can result in a laryngeal spasm or seizure which simply shuts off the trachial air passage, leading to death by asphyxiation. Also, it must result in transmission to the brain of nerve messages that there is immediate, acute danger of death. This transmission immediately sets up a 'flight or flee' syndrome wherein the body reacts violently to save itself or escape. Adrenalin output increases enormously; blood oxygen is switched to muscles and strong, violent struggle ensues which is to a great extent involuntary. From a medical point of view, there would be no way to distinguish this involuntary death struggle from a wilful, voluntary resistance. Thus, an instruction to cease applying the hold when 'resistance ceases' is meaningless.

"This violent struggle . . . increases the risk of permanent injury or death to the victim. This reserve may already be in a state of reduction by reason of cardiac, respiratory or other disease.

"The LAPD [operates under a] misconception . . . that the length of time for applying the hold is the sole measure of risk. This is simply not true. If sufficient force is applied, the larynx can be crushed or hyoid fractured with death ensuing, in seconds. An irreversible laryngeal spasm can also occur in seconds.

"From a medical point of view, the carotid control is extremely dangerous in a manner that is at least as equally unpredictable as the bar arm control.

". . . When applied with sufficient pressure, this control will crush the carotid sheath against the bony structure of the neck, foreseeably shutting

Exh. 44, p. 93, in reference apparently to the reactions of a chicken when its neck is wrung. The victim experiences extreme pain. His face turns blue as he is deprived of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly.

Although there has been no occasion to determine the precise contours of the city's chokehold policy, the evidence submitted to the District Court provides some indications. LAPD Training Officer Terry Speer testified that an officer is authorized to deploy a chokehold whenever he "*feels* that there's about to be a bodily attack made on him." App. 381 (emphasis added). A training bulletin states that "[c]ontrol holds . . . allow officers to subdue *any* resistance by the suspects." Exh. 47, p. 1 (emphasis added). In the proceedings below the city characterized its own policy as authorizing the use of chokeholds "'to gain control of a suspect who is violently resisting the officer *or trying to escape*,'" to "subdue *any* resistance by the suspects,"[8] and to permit an officer, "where . . . resisted, but *not necessarily threatened with serious bodily harm or death*, . . . to subdue a suspect who forcibly resists an officer." (Emphasis added.)[9]

The training given LAPD officers provides additional revealing evidence of the city's chokehold policy. Officer

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down the supply of oxygenated blood to the brain and leading to unconsciousness in approximately 10 to 15 seconds.

"However, pressure on both carotid sheaths also results in pressure, if inadvertent or unintended, on both of the vagus nerves. The vagus nerves (right and left) arise in the brain and are composed of both sensory and motor fibers. . . . Stimulation of these nerves by pressure can activate reflexes within the vagus system that can result in immediate heart stoppage (cardiac arrest). . . . There is also evidence that cardiac arrest can result from simultaneous pressure on both vagus nerves regardless of the intensity or duration of the pressure."

[8] City's Opposition to Application for Preliminary Injunction, No 77-0420 (CD Cal.), pp. 26, 30.

[9] Brief in Opposition to Motion to Stay, in No. A-230 (CD Cal.), p. 4.

Speer testified that in instructing officers concerning the use of force, the LAPD does not distinguish between felony and misdemeanor suspects. App. 379. Moreover, the officers are taught to maintain the chokehold until the suspect goes limp, *id.*, at 387; App. to Pet. for Cert. 51a, despite substantial evidence that the application of a chokehold invariably induces a "flight or flee" syndrome, producing an *involuntary* struggle by the victim which can easily be misinterpreted by the officer as willful resistance that must be overcome by prolonging the chokehold and increasing the force applied. See n. 7, *supra*. In addition, officers are instructed that the chokeholds can be safely deployed for up to three or four minutes. App. 387–388; App. to Pet for Cert. 48. Robert Jarvis, the city's expert who has taught at the Los Angeles Police Academy for the past 12 years, admitted that officers are never told that the bar-arm control can cause death if applied for just two seconds. App. 388. Of the nine deaths for which evidence was submitted to the District Court, the average duration of the choke where specified was approximately 40 seconds.

C

In determining the appropriateness of a preliminary injunction, the District Court recognized that the city's policy is subject to the constraints imposed by the Due Process Clause of the Fourteenth Amendment. The court found that "[d]uring the course of this confrontation, said officers, without provocation or legal justification, applied a *Department-authorized* chokehold which resulted in injuries to plaintiff." (Emphasis added.) The court found that the "City of Los Angeles and the Department authorize the use of these holds under circumstances where no one is threatened by death or grievous bodily harm." The court concluded that the use of the chokeholds constitutes "deadly force," and that the city may not constitutionally authorize the use of such force "in situations where death or serious bodily harm is not threatened." On the basis of this conclusion, the District Court entered a preliminary injunction enjoining "the use of both the carotid-artery and bar arm holds under circumstances which do not threaten death or serious bodily injury." [10] As the Court of Appeals noted, "[a]ll the trial judge has done, so far, is to tell the city that its police officers may not apply life threatening strangleholds to persons stopped in routine police work unless the application of such force is necessary to prevent serious bodily harm to an officer." 656 F. 2d 417, 418 (1981).

II

At the outset it is important to emphasize that Lyons' entitlement to injunctive relief and his entitlement to an award of damages both depend upon whether he can show that the city's chokehold policy violates the Constitution. An indispensable prerequisite of municipal liability under 42 U. S. C. § 1983 is proof that the conduct complained of is attributable to an unconstitutional official policy or custom. *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981); *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 694. It is not enough for a § 1983 plaintiff to show that the employees or agents of a municipality have violated or will violate the Constitution, for a municipality will not be held liable solely on a theory of *respondeat superior*. See *Monell*, *supra*, at 694.

The Court errs in suggesting that Lyons' prayer for injunctive relief in Count V of his first amended complaint concerns a policy that was not responsible for his injuries and that therefore could not support an award of damages. *Ante*, at 106–107, n. 7. Paragraph 8 of the complaint alleges that Lyons was choked "without provocation, legal justification or excuse." Paragraph 13 expressly alleges that "[t]he Defendant Officers were carrying out *the official policies, customs and practices* of the Los Angeles Police Department and the City of Los Angeles," and that "*by virtue thereof*, defendant City is liable for the actions" of the officers. (Emphasis added.) These allegations are incorporated in each of the Counts against the city, including Count V.

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[10] The preliminary injunction provided that the city itself could lift the injunction by obtaining court approval of a training program, and also required the city to keep records of all uses of chokeholds and to make those records available.

The District Court refrained from determining the precise nature of the city's policy given the limited nature of its inquiry at the preliminary injunction stage. *Brown* v. *Chote*, 411 U. S. 452, 456 (1973).

There is no basis for the Court's assertion that Lyons has failed to allege "that the City either orders or authorizes application of the chokeholds where there is no resistance or other provocation." *Ante*, at 106, n. 7. I am completely at a loss to understand how paragraphs 8 and 13 can be deemed insufficient to allege that the city's policy authorizes the use of chokeholds without provocation. The Court apparently finds Lyons' complaint wanting because, although it alleges that he was choked without provocation and that the officers acted pursuant to an official policy, it fails to allege *in haec verba* that the city's policy authorizes the choking of suspects without provocation. I am aware of no case decided since the abolition of the old common-law forms of action, and the Court cites none, that in any way supports this crabbed construction of the complaint. A federal court is capable of concluding for itself that two plus two equals four.[11]

The Court also errs in asserting that even if the complaint sufficiently alleges that the city's policy authorizes the use of chokeholds without provocation, such an allegation is in any event "belied by the record made on the application for preliminary injunction." *Ibid.* This conclusion flatly contradicts the District Court's express factual finding, which was left undisturbed by the Court of Appeals, that the officers applied a "*Department-authorized* chokehold which resulted in injuries to plaintiff." (Emphasis added.) The city does not contend that this factual finding is clearly erroneous.[12]

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[11] Contrary to the Court's suggestion, *ante*, at 106–107, n. 7, there is clearly no inconsistency between the allegation in paragraph 8 of the complaint that Lyons was choked "without provocation, legal justification or excuse," and the allegations that the city authorizes chokeholds "in situations where [officers] are threatened by far less than deadly force." ¶¶ 20, 23.

In sum, it is absolutely clear that Lyons' requests for damages and for injunctive relief call into question the constitutionality of the city's policy concerning the use of chokeholds. If he does not show that that policy is unconstitutional, he will be no more entitled to damages than to an injunction.

III

Since Lyons' claim for damages plainly gives him standing, and since the success of that claim depends upon a demonstration that the city's chokehold policy is unconstitutional, it is beyond dispute that Lyons has properly invoked the District Court's authority to adjudicate the constitutionality of the city's chokehold policy. The dispute concerning the constitutionality of that policy plainly presents a "case or controversy" under Art. III. The Court nevertheless holds that a federal court has no power under Art. III to adjudicate Lyons' request, in the same lawsuit, for injunctive relief with respect to that very policy. This anomalous result is not supported either by precedent or by the fundamental concern underlying the standing requirement. Moreover, by fragmenting a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this

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[12] Even if the issue were properly before us, I could not agree that this Court should substitute its judgment for that of the District Court. One of the city's own training officers testified that an officer is authorized to use a chokehold whenever he "feels that there's about to be a bodily attack made on him." App. 381. This testimony indicates that an officer is authorized to use a chokehold whenever he subjectively perceives a threat, regardless of whether the suspect has done anything to provide an objective basis for such a perception. The District Court's finding is not refuted by the statement of the city's policy which is set forth in an LAPD manual, *ante*, at 110, for municipal liability under § 1983 may be predicated on proof of an official custom whether or not that custom is embodied in a formal policy. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694 (1978).

Court's traditional conception of standing and of the remedial powers of the federal courts.

A

It is simply disingenuous for the Court to assert that its decision requires "[n]o extension" of *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), and *Rizzo* v. *Goode*, 423 U. S. 362 (1976). *Ante*, at 105. In contrast to this case *O'Shea* and *Rizzo* involved disputes focusing solely on the threat of future injury which the plaintiffs in those cases alleged they faced. In *O'Shea* the plaintiffs did not allege past injury and did not seek compensatory relief.[13] In *Rizzo*, the plaintiffs sought only declaratory and injunctive relief and alleged past instances of police misconduct only in an attempt to establish the substantiality of the threat of future injury. There was similarly no claim for damages based on past injuries in *Ashcroft* v. *Mattis*, 431 U. S. 171 (1977), or *Golden* v. *Zwickler*, 394 U. S. 103 (1969),[14] on which the Court also relies.

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[13] Although counsel for the plaintiffs in *O'Shea* suggested at oral argument that certain plaintiffs had been exposed to illegal conduct in the past, in fact "[n]o damages were sought against the petitioners . . . nor were any specific instances involving the individually named respondents set forth in the claim against these judicial officers." 414 U. S., at 492. The Court referred to the absence of past injury repeatedly. See *id.*, at 492, 495, and n. 3.

[14] The plaintiff in *Mattis* did originally seek damages, but after the District Court found that the defendant officers were shielded by the good-faith immunity, he pursued only prospective relief. Although we held that the case had been mooted by the elimination of the damages claim, we in no way suggested that the plaintiff's requests for declaratory and injunctive relief could not have been entertained had his damages claim remained viable. We held only that where a plaintiff's "primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's death was wrongful," 431 U. S., at 172 (footnote omitted), he does not have the personal stake in the outcome required by Art. III. In *Zwickler* the plaintiff did not even allege that he would or might run for office again; he merely asserted that he "can be 'a candidate for Congress again.'" 394 U. S., at 109. We held that this mere logical possibility was insufficient to present an actual controversy.

These decisions do not support the Court's holding today. As the Court recognized in *O'Shea*, standing under Art. III is established by an allegation of "'threatened *or* actual injury.'" 414 U. S., at 493, quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973) (emphasis added). See also 414 U. S., at 493, n. 2. Because the plaintiffs in *O'Shea*, *Rizzo*, *Mattis*, and *Zwickler* did not seek to redress past injury, their standing to sue depended entirely on the risk of future injury they faced. Apart from the desire to eliminate the possibility of future injury, the plaintiffs in those cases had no other personal stake in the outcome of the controversies.

By contrast, Lyons' request for prospective relief is coupled with his claim for damages based on past injury. In addition to the risk that he will be subjected to a chokehold in the future, Lyons has suffered past injury.[15] Because he has a live claim for damages, he need not rely solely on the threat of future injury to establish his personal stake in the outcome of the controversy.[16] In the cases relied on by the majority, the Court simply had no occasion to decide whether a plaintiff who has standing to litigate a dispute must clear a separate standing hurdle with respect to each form of relief sought.[17]

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[15] In *Lankford* v. *Gelston*, 364 F. 2d 197 (1966) (en banc), which we cited with approval in *Allee* v. *Medrano*, 416 U. S. 802, 816, n. 9 (1974), the Fourth Circuit found standing on facts indistinguishable from this case. In *Lankford*, the Court of Appeals held that four Negro families who had been subjected to an illegal house search were entitled to seek injunctive relief against the Baltimore Police Department's policy of conducting wholesale searches based only on uncorroborated anonymous tips, even though the plaintiffs there did not claim that they were more likely than other Negro residents of the city to be subjected to an illegal search in the future.

[16] In *O'Shea* itself the Court suggested that the absence of a damages claim was highly pertinent to its conclusion that the plaintiff had no standing. The Court noted that plaintiffs' "claim for relief against the State's Attorney[,] where specific instances of misconduct with respect to particular individuals *are* alleged," 414 U. S., at 495 (emphasis added), stood in "sharp contrast" to their claim for relief against the magistrate and judge, which did not contain similar allegations. The plaintiffs did seek damages against the State's Attorney. See *Spomer* v. *Littleton*, 414 U. S. 514, 518, n. 5 (1974). Like the claims against the State's Attorney in *O'Shea*, Lyons' claims against the city allege both past injury and the risk of future injury. Whereas in *O'Shea* the Court acknowledged the significance for standing

B

The Court's decision likewise finds no support in the fundamental policy underlying the Art. III standing requirement—the concern that a federal court not decide a legal issue if the plaintiff lacks a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U. S., at 204. As this Court stated in *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." See also *Valley Forge Christian College* v.

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purposes of past injury, the Court today inexplicably treats Lyons' past injury for which he is seeking redress as wholly irrelevant to the standing inquiry before us.

[17] The Court's reliance on *Rizzo* is misplaced for another reason. In *Rizzo* the Court concluded that the evidence presented at trial failed to establish an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [defendants]." 423 U. S., at 371. Because the misconduct being challenged was, in the Court's view, the result of the behavior of unidentified officials not named as defendants rather than any policy of the named defendants—the City Managing Director, and the Police Commissioner, *id.*, at 372—the Court had "serious doubts" whether a case or controversy existed between the plaintiffs and those defendants. Here, by contrast, Lyons has clearly established a case or controversy between himself and the city concerning the constitutionality of the city's policy. See *supra*, at 120–122. In *Rizzo* the Court specifically distinguished those cases where a case or controversy was found to exist because of the existence of an official policy responsible for the past or threatened constitutional deprivations. 423 U. S., at 373–374, distinguishing *Hague* v. *CIO*, 307 U. S. 496 (1939); *Allee* v. *Medrano*, 416 U. S. 802 (1974); *Lankford* v. *Gelston*, *supra*.

Americans United for Separation of Church and State, 454 U. S. 464, 472 (1982) (standing requirement ensures that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

Because Lyons has a claim for damages against the city, and because he cannot prevail on that claim unless he demonstrates that the city's chokehold policy violates the Constitution, his personal stake in the outcome of the controversy adequately assures an adversary presentation of his challenge to the constitutionality of the policy.[18] Moreover, the resolution of this challenge will be largely dispositive of his requests for declaratory and injunctive relief. No doubt the requests for injunctive relief may raise additional questions. But these questions involve familiar issues relating to the appropriateness of particular forms of relief, and have never been thought to implicate a litigant's standing to sue. The denial of standing separately to seek injunctive relief therefore cannot be justified by the basic concern underlying the Art. III standing requirement.[19]

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[18] It is irrelevant that the District Court has severed Lyons' claim for damages from his claim for injunctive relief. *Ante*, at 105, n. 6. If the District Court, in deciding whether to issue an injunction, upholds the city's policy against constitutional attack, this ruling will be res judicata with respect to Lyons' claim for damages. The severance of the claims therefore does not diminish Lyons' incentive to establish the unconstitutionality of the policy.

It is unnecessary to decide here whether the standing of a plaintiff who alleges past injury that is legally redressable depends on whether he specifically seek damages. See *Lankford* v. *Gelston*, *supra* (plaintiffs who did not seek damages permitted to seek injunctive relief based on past injury). See n. 15, *supra*.

[19] The Court errs in asserting that Lyons has no standing to seek injunctive relief because the injunction prayed for in Count V reaches suspects who, unlike Lyons, offer resistance or attempt to escape. *Ante*, at 106–107, n. 7. Even if a separate inquiry into Lyons' standing to seek injunctive relief as opposed to damages were appropriate, and even if he had no

C

By fragmenting the standing inquiry and imposing a separate standing hurdle with respect to each form of relief sought, the decision today departs significantly from this Court's traditional conception of the standing requirement and of the remedial powers of the federal courts. We have never required more than that a plaintiff have standing to litigate a claim. Whether he will be entitled to obtain particular forms of relief should he prevail has never been understood to be an issue of standing. In determining whether a plaintiff has standing, we have always focused on his personal stake in the outcome of the controversy, not on the issues sought to be litigated, *Flast* v. *Cohen*, *supra*, at 99, or the "precise nature of the relief sought." *Jenkins* v. *McKeithen*, 395 U. S., at 423 (opinion of MARSHALL, J., joined by Warren, C. J., and BRENNAN, J.).

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standing to seek the entire injunction he requests, it would not follow that he had no standing to seek any injunctive relief. Even under the Court's view, Lyons presumably would have standing to seek to enjoin the use of chokeholds without provocation. There would therefore be no justification for reversing the judgment below in its entirety.

The Court's reliance on the precise terms of the injunction sought in Count V is also misplaced for a more fundamental reason. Whatever may be said for the Court's novel rule that a separate showing of standing must be made for each form of relief requested, the Court is simply wrong in assuming that the scope of the injunction prayed for raises a question of standing. A litigant is entitled to advance any substantive legal theory which would entitle him to relief. Lyons' entitlement to relief may ultimately rest on the principle that a municipality may not authorize the use of chokeholds absent a threat of deadly force. This principle, which the District Court tentatively embraced in issuing the preliminary injunction, would support the entire injunction sought in Count V. Alternatively, Lyons' entitlement to relief may rest on some narrower theory. If Lyons prevails, the appropriateness of the injunction prayed for in Count V will depend on the legal principle upon which the District Court predicates its decision. It may well be judicious for the District Court, in the exercise of its discretion, to rest its decision on a theory that would not support the full scope of the injunction that Lyons requests. But this has nothing whatsoever to do with Lyons' standing.

1

Our cases uniformly state that the touchstone of the Art. III standing requirement is the plaintiff's personal stake in the underlying dispute, not in the particular types of relief sought. Once a plaintiff establishes a personal stake in a dispute, he has done all that is necessary to "invok[e] the court's authority . . . to challenge the action sought to be adjudicated." *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, *supra*, at 471–472. See, *e. g.*, *Flast* v. *Cohen*, 392 U. S., at 101 (stake in "the dispute to be adjudicated in the lawsuit"); *Eisenstadt* v. *Baird*, 405 U. S. 438, 443 (1972) (plaintiff must have "sufficient interest in challenging the statute's validity").

The personal stake of a litigant depends, in turn, on whether he has alleged a legally redressable injury. In determining whether a plaintiff has a sufficient personal stake in the outcome of a controversy, this Court has asked whether he "personally has suffered some actual *or* threatened injury," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979) (emphasis added), whether the injury "fairly can be traced to the challenged action," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41 (1976), and whether plaintiff's injury "is likely to be redressed by a favorable decision." *Id.*, at 38. See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 74 (1978); *Warth* v. *Seldin*, 422 U. S. 490, 508 (1975). These well-accepted criteria for determining whether a plaintiff has established the requisite personal stake do not fragment the standing inquiry into a series of discrete questions about the plaintiff's stake in each of the particular types of relief sought. Quite the contrary, they ask simply whether the plaintiff has a sufficient stake in seeking a judicial resolution of the controversy.

Lyons has alleged past injury and a risk of future injury and has linked both to the city's chokehold policy. Under established principles, the only additional question in determining standing under Art. III is whether the injuries he has alleged can be remedied or prevented by *some* form of judicial relief. Satisfaction of this requirement ensures that the lawsuit does not entail the issuance of an advisory opinion without the possibility of any judicial relief, and that the exercise of a court's remedial powers will actually redress the alleged injury.[20] Therefore Lyons needs to demonstrate only that, should he prevail on the merits, "the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co.*, *supra*, at 74. See also *Warth* v. *Seldin*, *supra*, at 508; *Simon*, *supra*, at 38. Lyons has easily made this showing here, for monetary relief would plainly provide redress for his past injury, and prospective relief would reduce the likelihood of any future injury. Nothing more has ever been required to establish standing.

The Court's decision turns these well-accepted principles on their heads by requiring a separate standing inquiry with respect to each request for relief. Until now, questions concerning remedy were relevant to the threshold issue of standing only in the limited sense that some relief must be possible. The approach adopted today drastically alters the inquiry into remedy that must be made to determine standing.

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[20] This limited inquiry into remedy, which addresses two *jurisdictional* concerns, provides no support for the Court's requirement that standing be separately demonstrated with respect to each particular form of relief sought. First, a court must have the power to fashion *some* appropriate remedy. This concern, an aspect of the more general case-or-controversy requirement, reflects the view that the adjudication of rights which a court is powerless to enforce is tantamount to an advisory opinion. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937) ("[The controversy] must be a real and substantial [one] *admitting of specific relief* through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (emphasis added). Second, a court must determine that there is an available remedy which will have a "substantial probability," *Warth* v. *Seldin*, 422 U. S. 490, 508 (1975), of redressing the plaintiff's injury. This latter concern is merely a recasting of the causal nexus, *supra*, at 128, that must exist between the alleged injury and the action being challenged, and ensures that the granting of judicial relief will not be an exercise in futility. See *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 74 (1978). These considerations are summarized by the requirement that a plaintiff need only allege an injury that is "legally redress*able*." *Jenkins* v. *McKeithen*, 395 U. S. 411, 424 (1969) (emphasis added).

2

The Court's fragmentation of the standing inquiry is also inconsistent with the way the federal courts have treated remedial issues since the merger of law and equity. The federal practice has been to reserve consideration of the appropriate relief until after a determination of the merits, not to foreclose certain forms of relief by a ruling on the pleadings. The prayer for relief is no part of the plaintiff's cause of action. See 2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 8.18, p. 8–216, and n. 13 (1983) (Moore), and cases cited therein; C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2664 (1983) (Wright, Miller, & Kane). Rather, "[the usual rule is] that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946) (footnote omitted).

Rule 54(c) of the Federal Rules of Civil Procedure specifically provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The question whether a plaintiff has stated a claim turns not on "whether [he] has asked for the proper remedy but whether he is entitled to *any* remedy." (Emphasis added.) Wright, Miller, & Kane § 2664. This is fully consistent with the approach taken in our standing cases. *Supra*, at 128–129 and this page, and n. 20.

The Court provides no justification for departing from the traditional treatment of remedial issues and demanding a separate threshold inquiry into each form of relief a plaintiff seeks. It is anomalous to require a plaintiff to demonstrate "standing" to seek each particular form of relief requested in the complaint when under Rule 54(c) the remedy to which a party may be entitled need not even be demanded in the complaint.[21] See *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 65–66 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975). The traditional federal practice is a sound one. Even if it appears highly unlikely at the outset of a lawsuit that a plaintiff will establish that he is entitled to a particular remedy, there are dangers inherent in any doctrine that permits a court to foreclose any consideration of that remedy by ruling on the pleadings that the plaintiff lacks standing to seek it. A court has broad discretion to grant appropriate equitable relief to protect a party who has been injured by unlawful conduct, as well as members of the class, from future injury that may occur if the wrongdoer is permitted to continue his unlawful actions. Where, as here, a plaintiff alleges both past injury and a risk of future injury and presents a concededly substantial claim that a defendant is implementing an unlawful policy, it will rarely be easy to decide with any certainty at the outset of a lawsuit that no equitable relief would be appropriate under any conceivable set of facts that he might establish in support of his claim.

In sum, the Court's approach to standing is wholly inconsistent with well-established standing principles and clashes with our longstanding conception of the remedial powers of a court and what is necessary to invoke the authority of a court to resolve a particular dispute.

IV

Apart from the question of standing, the only remaining question presented in the petition for certiorari is whether the preliminary injunction issued by the District Court must be set aside because it "constitute[s] a substantial interference in the operation of a municipal police department." Pet. for Cert. i.[22] In my view it does not.

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[21] It is not clear from the Court's opinion whether the District Court is wholly precluded from granting *any* form of declaratory or injunctive relief, even if it ultimately holds that Lyons should prevail on his claim for damages against the city on the ground that the city's chokehold policy is unconstitutional and is responsible for his injury.

In the portion of its brief concerning this second question, the city argues that the District Court ignored the principles of federalism set forth in *Rizzo* v. *Goode*, 423 U. S. 362 (1976). Brief for Petitioner 40–47. The city's reliance on *Rizzo* is misplaced. That case involved an injunction which "significantly revis[ed] the internal procedures of the Philadelphia police department." 423 U. S., at 379. The injunction required the police department to adopt "'a comprehensive program for dealing adequately with civilian complaints'" to be formulated in accordance with extensive "guidelines" established by the District Court. *Id.*, at 369, quoting *Council of Organizations on Phila. Police A. & R.* v. *Rizzo*, 357 F. Supp. 1289, 1321 (1973). Those guidelines specified detailed revisions of police manuals and rules of procedure, as well as the adoption of specific procedures for processing, screening, investigating, and adjudicating citizen complaints. In addition, the District Court supervised the implementation of the comprehensive program, issuing detailed orders concerning the posting and distribution of the revised police procedures and the drawing up of a "Citizen's Complaint Report" in a format designated by the court. The District Court also reserved jurisdiction to review the progress of the police department. 423 U. S., at 365, n. 2. This Court concluded that the sweeping nature of the injunctive relief was inconsistent with "the principles of federalism." *Id.*, at 380.

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[22] Question 1 of the petition raised the question of Lyons' standing. Question 2 of the petition states: "Does a federal court order constitute a substantial interference in the operation of a municipal police department where it (a) modifies policies concerning use of force and (b) takes control of such department's training and reporting systems relative to a particular force technique?"

The principles of federalism simply do not preclude the limited preliminary injunction issued in this case. Unlike the permanent injunction at issue in *Rizzo*, the preliminary injunction involved here entails no federal supervision of the LAPD's activities. The preliminary injunction merely forbids the use of chokeholds absent the threat of deadly force, permitting their continued use where such a threat does exist. This limited ban takes the form of a preventive injunction, which has traditionally been regarded as the least intrusive form of equitable relief. Moreover, the city can remove the ban by obtaining approval of a training plan. Although the preliminary injunction also requires the city to provide records of the uses of chokeholds to respondent and to allow the court access to such records, this requirement is hardly onerous, since the LAPD already maintains records concerning the use of chokeholds.

A district court should be mindful that "federal-court intervention in the daily operation of a large city's police department . . . is undesirable and to be avoided if at all possible." *Rizzo*, *supra*, at 381 (BLACKMUN, J., dissenting).[23] The modest interlocutory relief granted in this case differs markedly, however, from the intrusive injunction involved in *Rizzo*, and simply does not implicate the federalism concerns that arise when a federal court undertakes to "supervise the functioning of the police department." 423 U. S., at 380.

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[23] Of course, municipalities may be enjoined under § 1983, *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), and this Court has approved of the issuance of injunctions by federal courts against state or municipal police departments where necessary to prevent the continued enforcement of unconstitutional official policies. See, *e. g.*, *Allee* v. *Medrano*, 416 U. S. 802 (1974); *Hague* v. *CIO*, 307 U. S. 496 (1939); *Lankford* v. *Gelston*, 364 F. 2d 197 (CA4 1966) (en banc), cited with approval in *Allee*, *supra*, at 816. Although federalism concerns are relevant in fashioning an appropriate relief, we have stated repeatedly that a federal court retains the power to order any available remedy necessary to afford full relief for the invasion of legal rights. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 14 (1971); *Bell* v. *Hood*, 327 U. S. 678, 684 (1946).

V

Apparently because it is unwilling to rely solely on its unprecedented rule of standing, the Court goes on to conclude that, even if Lyons has standing, "[t]he equitable remedy is unavailable." *Ante*, at 111. The Court's reliance on this alternative ground is puzzling for two reasons.

If, as the Court says, Lyons lacks standing under Art. III, the federal courts have no power to decide his entitlement to equitable relief on the merits. Under the Court's own view of Art. III, the Court's discussion in Part V is purely an advisory opinion.

In addition, the question whether injunctive relief is available under equitable principles is simply not before us. We granted certiorari only to determine whether Lyons has standing and whether, if so, the preliminary injunction must be set aside because it constitutes an impermissible interference in the operation of a municipal police department. We did not grant certiorari to consider whether Lyons satisfies the traditional prerequisites for equitable relief. See n. 22, *supra*.

Even if the issue had been properly raised, I could not agree with the Court's disposition of it. With the single exception of *Rizzo* v. *Goode*, *supra*,[24] all of the cases relied on by the Court concerned injunctions against state criminal proceedings. The rule of *Younger* v. *Harris*, 401 U. S. 37 (1971), that such injunctions can be issued only in extraordinary circumstances in which the threat of injury is "great and immediate," *id.*, at 46, reflects the venerable rule that equity will not enjoin a criminal prosecution, the fact that constitutional defenses can be raised in such a state prosecution, and an appreciation of the friction that injunctions against state judicial proceedings may produce. See *ibid.; Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974); 28 U. S. C. §2283.

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[24] As explained above, *Rizzo* v. *Goode* does not support a decision barring Lyons from obtaining any injunctive relief, for that case involved an injunction which entailed judicial supervision of the workings of a municipal police department, not simply the sort of preventive injunction that Lyons seeks. *Supra*, at 132–133.

Our prior decisions have repeatedly emphasized that where an injunction is not directed against a state criminal or quasi-criminal proceeding, "the relevant principles of equity, comity, and federalism" that underlie the *Younger* doctrine "have little force." *Steffel* v. *Thompson*, *supra*, at 462, citing *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972). Outside the special context in which the *Younger* doctrine applies, we have held that the appropriateness of injunctive relief is governed by traditional equitable considerations. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930 (1975). Whatever the precise scope of the *Younger* doctrine may be, the concerns of comity and federalism that counsel restraint when a federal court is asked to enjoin a state criminal proceeding simply do not apply to an injunction directed solely at a police department.

If the preliminary injunction granted by the District Court is analyzed under general equitable principles, rather than the more stringent standards of *Younger* v. *Harris*, it becomes apparent that there is no rule of law that precludes equitable relief and requires that the preliminary injunction be set aside. "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown* v. *Chote*, 411 U. S. 452, 457 (1973).

The District Court concluded, on the basis of the facts before it, that Lyons was choked without provocation pursuant to an unconstitutional city policy. *Supra*, at 119. Given the necessarily preliminary nature of its inquiry, there was no way for the District Court to know the precise contours of the city's policy or to ascertain the risk that Lyons, who had alleged that the policy was being applied in a discriminatory manner, might again be subjected to a chokehold. But in view of the Court's conclusion that the unprovoked choking of

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Lyons was pursuant to a city policy, Lyons has satisfied "the usual basis for injunctive relief, 'that there exists some cognizable danger of recurrent violation.'" *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 59 (1975), quoting *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). The risk of serious injuries and deaths to other citizens also supported the decision to grant a preliminary injunction. Courts of equity have much greater latitude in granting injunctive relief "in furtherance of the public interest than . . . when only private interests are involved." *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 552 (1937). See Wright, Miller, & Kane §2948; 7 Moore ¶65.04[1]. In this case we know that the District Court would have been amply justified in considering the risk to the public, for after the preliminary injunction was stayed, five additional deaths occurred prior to the adoption of a moratorium. See n. 3, *supra*. Under these circumstances, I do not believe that the District Court abused its discretion.

Indeed, this Court has approved of a decision that directed issuance of a *permanent* injunction in a similar situation. See *Lankford* v. *Gelston*, 364 F. 2d 197 (CA4 1966), cited with approval in *Allee* v. *Medrano*, 416 U. S. 802, 816, n. 9 (1974). See n. 15, *supra*. In *Lankford*, citizens whose houses had been searched solely on the basis of uncorroborated, anonymous tips sought injunctive relief. The Fourth Circuit, sitting en banc, held that the plaintiffs were entitled to an injunction against enforcement of the police department policy authorizing such searches, even though there was no evidence that their homes would be searched in the future. Lyons is no less entitled to seek injunctive relief. To hold otherwise is to vitiate "one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable." *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82 (1902).

Here it is unnecessary to consider the propriety of a permanent injunction. The District Court has simply sought to protect Lyons and other citizens of Los Angeles pending a disposition of the merits. It will be time enough to consider the propriety of a permanent injunction when and if the District Court grants such relief.

VI

The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future. THE CHIEF JUSTICE asked in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 419 (1971) (dissenting opinion), "what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive"? His answer was that it would be "easy to predict our collective wrath and outrage." *Ibid.* We now learn that wrath and outrage cannot be translated into an order to cease the unconstitutional practice, but only an award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate. Under the view expressed by the majority today, if the police adopt a policy of "shoot to kill," or a policy of shooting 1 out of 10 suspects, the federal courts will be powerless to enjoin its continuation. Cf. *Linda R. S.* v. *Richard D.*, 410 U. S., at 621 (WHITE, J., dissenting). The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.

CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1251. Argued November 8, 1982—Decided April 20, 1983

Respondent was employed as an Assistant District Attorney in New Orleans with the responsibility of trying criminal cases. When petitioner District Attorney proposed to transfer respondent to prosecute cases in a different section of the criminal court, she strongly opposed the transfer, expressing her view to several of her supervisors, including petitioner. Shortly thereafter, she prepared a questionnaire that she distributed to the other Assistant District Attorneys in the office concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Petitioner then informed respondent that she was being terminated for refusal to accept the transfer, and also told her that her distribution of the questionnaire was considered an act of insubordination. Respondent filed suit in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. V), alleging that she was wrongfully discharged because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered her reinstated, and awarded backpay, damages, and attorney's fees. Finding that the questionnaire, not the refusal to accept the transfer, was the real reason for respondent's termination, the court held that the questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that the questionnaire interfered with the operation of the District Attorney's office. The Court of Appeals affirmed.

Held: Respondent's discharge did not offend the First Amendment. Pp. 142–154.

(a) In determining a public employee's rights of free speech, the problem is to arrive "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U. S. 563, 568. P. 142.

(b) When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Here, except for the question in respondent's questionnaire regarding pressure upon employees to work in political campaigns, the questions posed do not fall under the rubric of matters of "public concern." Pp. 143–149.

(c) The District Court erred in imposing an unduly onerous burden on the State to justify respondent's discharge by requiring it to "clearly demonstrate" that the speech involved "substantially interfered" with the operation of the office. The State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Pp. 149–150.

(d) The limited First Amendment interest involved here did not require petitioner to tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships within the office. The question on the questionnaire regarding the level of confidence in supervisors was a statement that carried the clear potential for undermining office relations. Also, the fact that respondent exercised her rights to speech at the office supports petitioner's fears that the function of his office was endangered. And the fact that the questionnaire emerged immediately after a dispute between respondent and petitioner and his deputies, requires that additional weight be given to petitioner's view that respondent threatened his authority to run the office. Pp. 150–154.

654 F. 2d 719, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 156.

William F. Wessel argued the cause for petitioner. With him on the brief was *Victoria Lennox Bartels*.

George M. Strickler, Jr., argued the cause for respondent. With him on the brief were *Ann Woolhandler* and *Michael G. Collins*.*

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*Briefs of *amici curiae* urging affirmance were filed by *Mark C. Rosenblum, Nadine Strossen*, and *Charles S. Sims* for the American Civil Liberties Union et al.; and by *Robert H. Chanin, Laurence Gold*, and *Marsha S. Berzon* for the National Education Association et al.

JUSTICE WHITE delivered the opinion of the Court.

In *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.*, at 568. The problem, we thought, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period Myers competently performed her responsibilities of trying criminal cases.

In the early part of October 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer[1] and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6 Myers was notified that she was being transferred. Myers again spoke with Dennis Waldron, one of the First Assistant District Attorneys, expressing her reluctance to accept the transfer. A number of other office matters were discussed and Myers later testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do some research on the matter.

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[1] Myers' opposition was at least partially attributable to her concern that a conflict of interest would have been created by the transfer because of her participation in a counseling program for convicted defendants released on probation in the section of the criminal court to which she was to be assigned.

That night Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.[2] Early the following morning, Myers typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

Myers filed suit under 42 U. S. C. § 1983 (1976 ed., Supp. V), contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and attorney's fees. 507 F. Supp. 752 (ED La. 1981).[3] The District Court found that although Connick informed Myers that she was being fired because of her refusal to accept a transfer, the facts showed that the questionnaire was the real reason for her termination. The court then proceeded to hold that Myers' questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's office.

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[2] The questionnaire is reproduced as an Appendix to this opinion.

Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed on the basis of the District Court's opinion. 654 F. 2d 719 (1981). Connick then sought review in this Court by way of certiorari, which we granted. 455 U. S. 999 (1982).

II

For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606 (1967); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968); *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972); *Branti* v. *Finkel*, 445 U. S. 507, 515–516 (1980). Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568. The District Court, and thus the Court of Appeals as well, misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance for respondent.

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[3] Petitioner has also objected to the assessment of damages as being in violation of the Eleventh Amendment and to the award of attorney's fees. Because of our disposition of the case, we do not reach these questions.

A

The District Court got off on the wrong foot in this case by initially finding that, "[t]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." 507 F. Supp., at 758. Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in *Pickering*. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering*'s progeny,[4] reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.[5]

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517, 517 (1892). For many years, Holmes' epigram expressed this Court's law. *Adler* v. *Board of Education*, 342 U. S. 485 (1952); *Garner* v. *Los Angeles Bd. of Public Works*, 341 U. S. 716 (1951); *Public Workers* v. *Mitchell*, 330 U. S. 75 (1947); *United States* v. *Wurzbach*, 280 U. S. 396 (1930); *Ex parte Curtis*, 106 U. S. 371 (1882).

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[4] See *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 284 (1977); *Givhan* v. *Western Line Consolidated School District*, 439 U. S. 410, 414 (1979).

[5] The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See Restatement (Second) of Torts § 652D (1977). See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975) (action for invasion of privacy cannot be maintained when the subject matter of the publicity is matter of public record); *Time, Inc.* v. *Hill*, 385 U. S. 374, 387–388 (1967).

The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950's and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated. In *Wiemann* v. *Updegraff*, 344 U. S. 183 (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. See also *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960); *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961). By the time *Sherbert* v. *Verner*, 374 U. S. 398 (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.*, at 404. It was therefore no surprise when in *Keyishian* v. *Board of Regents*, *supra*, the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected. *Id.*, at 605–606.

In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the heirarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980).

Pickering v. *Board of Education*, *supra*, followed from this understanding of the First Amendment. In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U. S. at 571–572.

Our cases following *Pickering* also involved safeguarding speech on matters of public concern. The controversy in *Perry* v. *Sindermann*, 408 U. S. 593 (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas Legislature and had become involved in public disagreement over whether the college should be elevated to 4-year status—a change opposed by the Regents. In *Mt. Healthy City Board of Ed.* v.

Doyle, 429 U. S. 274 (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in *Givhan* v. *Western Line Consolidated School District*, 439 U. S. 410 (1979), we held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject matter of Mrs. Givhan's statements were not the issue before the Court, it is clear that her statements concerning the School District's allegedly racially discriminatory policies involved a matter of public concern.

Pickering, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.[6] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); *Perry* v. *Sindermann*, *supra; Bishop* v. *Wood*, 426 U. S. 341, 349–350 (1976).

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[6] See, *Clark* v. *Holmes*, 474 F. 2d 928 (CA7 1972), cert. denied, 411 U. S. 972 (1973); *Schmidt* v. *Fremont County School Dist.*, 558 F. 2d 982, 984 (CA10 1977).

We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 223 (1967), quoting *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); *Roth* v. *United States*, *supra; New York* v. *Ferber*, 458 U. S. 747 (1982). For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Cf. *Bishop* v. *Wood*, *supra*, at 349–350. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.[7] In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, *post*, at 163, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre.[8]

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[7] The inquiry into the protected status of speech is one of law, not fact. See n. 10, *infra*.

[8] This is not a case like *Givhan*, where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately. Mrs. Givhan's right to protest racial discrimination—a matter inherently of public concern—is not forfeited by her choice of a private forum. 439 U. S., at 415–416. Here, however, a questionnaire not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest. The dissent's analysis of whether discussions of office morale and discipline

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. *Branti* v. *Finkel*, 445 U. S., at 515–516; *Elrod* v. *Burns*, 427 U. S. 347 (1976). In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973); *Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.

B

Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether Connick was justified in discharging Myers. Here the District Court again erred in imposing an unduly onerous burden on the State to justify

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could be matters of public concern is beside the point—it does not answer whether *this* questionnaire is such speech.

Myers' discharge. The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. Yet *Pickering* unmistakably states, and respondent agrees,[9] that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.[10]

C

The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in "promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service." *Ex parte Curtis*, 106 U. S., at 373. As JUSTICE POWELL explained in his separate opinion in *Arnett* v. *Kennedy*, 416 U. S. 134, 168 (1974):

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[9] See Brief for Respondent 9 ("These factors, including the degree of the 'importance' of plaintiff's speech, were proper considerations to be weighed in the *Pickering* balance"); Tr. of Oral Arg. 30 (counsel for respondent) ("I certainly would not disagree that the content of the questionnaire, whether it affects a matter of great public concern or only a very narrow internal matter, is a relevant circumstance to be weighed in the Pickering analysis").

[10] "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946) (footnote omitted).

Because of this obligation, we cannot "avoid making an independent constitutional judgment on the facts of the case." *Jacobellis* v. *Ohio*, 378 U. S. 184, 190 (1964) (opinion of BRENNAN, J.). See *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964); *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 915–916, n. 50 (1982).

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." 507 F. Supp., at 759. Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships.[11] When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.[12] We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

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[11] Waldron testified that from what he had learned of the events on October 7, Myers "was trying to stir up other people not to accept the changes [transfers] that had been made on the memorandum and that were to be implemented." App. 167. In his view, the questionnaire was a "final act of defiance" and that, as a result of Myers' action, "there were going to be some severe problems about the changes" *Ibid.* Connick testified that he reached a similar conclusion after conducting his own investigation. "After I satisfied myself that not only wasn't she accepting the transfer, but that she was affirmatively opposing it and disrupting the routine of the office by this questionnaire. I called her in . . . [and dismissed her]." *Id.*, at 130.

The District Court rejected Connick's position because "[u]nlike a statement of fact which might be deemed critical of one's superiors, [Myers'] questionnaire was not a statement of fact but the presentation and solicitation of ideas and opinions," which are entitled to greater constitutional protection because "'under the First Amendment there is no such thing as a false idea.'" *Ibid.* This approach, while perhaps relevant in weighing the value of Myers' speech, bears no logical relationship to the issue of whether the questionnaire undermined office relationships. Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations.

Also relevant is the manner, time, and place in which the questionnaire was distributed. As noted in *Givhan* v. *Western Line Consolidated School District*, 439 U. S., at 415, n. 4: "Private expression . . . may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Here the questionnaire was prepared and distributed at the office; the manner of distribution required not only Myers to leave her work but others to do the same in order that the questionnaire be completed.[13] Although some latitude in when official work is performed is to be allowed when professional employees are involved, and Myers did not violate announced office policy,[14] the fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered.

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[12] Cf. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 52, n. 12 (1983) (proof of future disruption not necessary to justify denial of access to nonpublic forum on grounds that the proposed use may disrupt the property's intended function); *Greer* v. *Spock*, 424 U. S. 828 (1976) (same).

Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. Although we accept the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal, and thus does not constitute a sufficient defense under *Mt. Healthy*

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[13] The record indicates that some, though not all, of the copies of the questionnaire were distributed during lunch. Employee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the *Pickering* calculus, and might lead to a different conclusion. Cf. *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974).

[14] The violation of such a rule would strengthen Connick's position. See *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S., at 284.

City Board of Ed. v. *Doyle*, 429 U. S. 274 (1977), this does not render irrelevant the fact that the questionnaire emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy.

III

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. We reiterate, however, the caveat we expressed in *Pickering*, 391 U. S., at 569: "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here. The judgment of the Court of Appeals is

Reversed.

APPENDIX TO OPINION OF THE COURT

Questionnaire distributed by respondent on October 7, 1980.

PLAINTIFF'S EXHIBIT 2, App. 191

"PLEASE TAKE THE FEW MINUTES IT WILL REQUIRE TO FILL THIS OUT. YOU CAN FREELY EXPRESS YOUR OPINION WITH ANONYMITY GUARANTEED.

****

1. How long have you been in the Office? ______________
2. Were you moved as a result of the recent transfers? ___
3. Were the transfers as they effected *[sic]* you discussed with you by any superior prior to the notice of them being posted? ______________________
4. Do you think as a matter of policy, they should have been? ______________________ ______________
5. From your experience, do you feel office procedure regarding transfers has been fair? ______________
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it effects *[sic]* overall working performance of A.D.A. personnel? ______________
8. If so, how do you think it effects *[sic]* office morale? ___
9. Do you generally first learn of office changes and developments through rumor? ______________________
10. Do you have confidence in and would you rely on the word of:
    Bridget Bane ______________________
    Fred Harper ______________________
    Lindsay Larson ______________________
    Joe Meyer ______________________
    Dennis Waldron ______________________
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates? __________
12. Do you feel a grievance committee would be a worthwhile addition to the office structure? ______________

13. How would you rate office morale? ______
14. Please feel free to express any comments or feelings you have. ______

THANK YOU FOR YOUR COOPERATION IN THIS SURVEY."

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Sheila Myers was discharged for circulating a questionnaire to her fellow Assistant District Attorneys seeking information about the effect of petitioner's personnel policies on employee morale and the overall work performance of the District Attorney's Office. The Court concludes that her dismissal does not violate the First Amendment, primarily because the questionnaire addresses matters that, in the Court's view, are not of public concern. It is hornbook law, however, that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). Because the questionnaire addressed such matters and its distribution did not adversely affect the operations of the District Attorney's Office or interfere with Myers' working relationship with her fellow employees, I dissent.

I

The Court correctly reaffirms the long-established principle that the government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment. *E. g.*, *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606 (1967); *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968); *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). *Pickering* held that the First Amendment protects the rights of public employees "as citizens to comment on matters of public interest" in connection with the operation of the government agencies for which they work. 391 U. S., at 568. We recognized, however, that the government has legitimate interests in regulating the speech of its employees that differ significantly from its interests in regulating the speech of people generally. *Ibid.* We therefore held that the scope of public employees' First Amendment rights must be determined by balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

The balancing test articulated in *Pickering* comes into play only when a public employee's speech implicates the government's interests as an employer. When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are, of course, no different from those of the general public. See *id.*, at 574. Thus, whether a public employee's speech addresses a matter of public concern is relevant to the constitutional inquiry only when the statements at issue—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform its duties efficiently.[1]

The Court's decision today is flawed in three respects. First, the Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context in which a statement is made, is to be weighed *twice*—first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer. See *ante*, at 147–148, 152–153. Second, in concluding that the effect of respondent's personnel policies on employee morale and the work performance of the District Attorney's Office is not a matter of public concern, the Court impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal. See *ante*, at 148–149. Third, the Court misapplies the *Pickering* balancing test in holding that Myers could constitutionally be dismissed for circulating a questionnaire addressed to at least one subject that *was* "a matter of interest to the community," *ante*, at 149, in the absence of evidence that her conduct disrupted the efficient functioning of the District Attorney's Office.

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[1] Although the Court's opinion states that "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge," *ante*, at 146 (footnote omitted), I do not understand it to imply that a governmental employee's First Amendment rights outside the employment context are limited to speech on matters of public concern. To the extent that the Court's opinion may be read to suggest that the dismissal of a public employee for speech unrelated to a subject of public interest does not implicate First Amendment interests, I disagree, because our cases establish that public employees enjoy the full range of First Amendment rights guaranteed to members of the general public. Under the balancing test articulated in *Pickering*, however, the government's burden to justify such a dismissal may be lighter. See n. 4, *infra*.

II

The District Court summarized the contents of respondent's questionnaire as follows:

> "Plaintiff solicited the views of her fellow Assistant District Attorneys on a number of issues, including office transfer policies and the manner in which information of that nature was communicated within the office. The questionnaire also sought to determine the views of Assistants regarding office morale, the need for a grievance committee, and the level of confidence felt by the Assistants for their supervisors. Finally, the questionnaire inquired as to whether the Assistants felt pressured to work in political campaigns on behalf of office-supported candidates." 507 F. Supp. 752, 758 (ED La. 1981).

After reviewing the evidence, the District Court found that "[t]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." *Ibid.* The Court of Appeals affirmed on the basis of the District Court's findings and conclusions. 654 F. 2d 719 (CA5 1981). The Court nonetheless concludes that Myers' questions about the effect of petitioner's personnel policies on employee morale and overall work performance are not "of public import in evaluating the performance of the District Attorney as an elected official." *Ante*, at 148. In so doing, it announces the following standard: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . ." *Ante*, at 147–148.

The standard announced by the Court suggests that the manner and context in which a statement is made must be weighed on *both* sides of the *Pickering* balance. It is beyond dispute that how and where a public employee expresses his views are relevant in the second half of the *Pickering* inquiry—determining whether the employee's speech adversely affects the government's interests as an employer. The Court explicitly acknowledged this in *Givhan* v. *Western Line Consolidated School District*, 439 U. S. 410 (1979), where we stated that when a public employee speaks privately to a supervisor, "the employing agency's institutional efficiency may be threatened not only by the content of the . . . message but also by the manner, time, and place in which it is delivered." *Id.*, at 415, n. 4. But the fact that a public employee has chosen to express his views in private has nothing whatsoever to do with the first half of the *Pickering* calculus—whether those views relate to a matter of public concern. This conclusion is implicit in *Givhan*'s holding that the freedom of speech guaranteed by the First Amendment is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." 439 U. S., at 415–416.

The Court seeks to distinguish *Givhan* on the ground that speech protesting racial discrimination is "inherently of public concern." *Ante*, at 148, n. 8. In so doing, it suggests that there are two classes of speech of public concern: statements "of public import" because of their content, form, and context, and statements that, by virtue of their subject matter, are "inherently of public concern." In my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why. The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy.[2]

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v.

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[2] Although the parties offered no evidence on whether the subjects addressed by the questionnaire were, in fact, matters of public concern, extensive local press coverage shows that the issues involved are of interest to the people of Orleans Parish. Shortly after the District Court took the case under advisement, a major daily newspaper in New Orleans carried a 7-paragraph story describing the questionnaire, the events leading to Myers' dismissal, and the filing of this action. The Times-Picayune/The States-Item, Dec. 6, 1980, section 1, p. 21, col. 1. The same newspaper also carried a 16-paragraph story when the District Court ruled in Myers' favor, Feb. 11, 1981, section 1, p. 15, col. 2; a 14-paragraph story when the Court of Appeals affirmed the District Court's decision, July 28, 1981, section 1, p. 11, col. 1; a 12-paragraph story when this Court granted Connick's petition for certiorari, Mar. 9, 1982, section 1, p. 15, col. 5.; and a 17-paragraph story when we heard oral argument, Nov. 9, 1982, section 1, p. 13, col. 5.

In addition, matters affecting the internal operations of the Orleans Parish District Attorney's Office often receive extensive coverage in the same newspaper. For example, The Times-Picayune/The States-Item carried a lengthy story reporting that the agency moved to "plush new offices," and describing in detail the "privacy problem" faced by Assistant District Attorneys because the office was unable to obtain modular furniture with which to partition its new space. Jan. 25, 1981, section 8, p. 13, col. 1. It also carried a 16-paragraph story when a committee of the Louisiana State Senate voted to prohibit petitioner from retaining a public relations specialist. July 9, 1982, section 1, p. 14, col. 1.

In light of the public's interest in the operations of the District Attorney's Office in general, and in the dispute between the parties in particular, it is quite possible that, contrary to the Court's view, *ante*, at 148–149, Myers' comments concerning morale and working conditions in the office would actually have engaged the public's attention had she stated them publicly.

Louisiana, 379 U. S. 64, 74–75 (1964). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).

We have long recognized that one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government. *Mills* v. *Alabama*, 384 U. S., at 218–219; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270 (1964). See A. Meiklejohn, Free Speech and Its Relation to Self-Government 22–27 (1948). "No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny." *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862 (1974) (POWELL, J., dissenting).

Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government.

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, *the manner in which government is operated or should be operated*, and all such matters relating to political processes." *Mills* v. *Alabama*, *supra*, at 218–219 (emphasis added).

Moreover, as a general matter, the media frequently carry news stories reporting that personnel policies in effect at a government agency have resulted in declining employee morale and deteriorating agency performance.

The constitutionally protected right to speak out on governmental affairs would be meaningless if it did not extend to statements expressing criticism of governmental officials. In *New York Times Co.* v. *Sullivan*, *supra*, we held that the Constitution prohibits an award of damages in a libel action brought by a public official for criticism of his official conduct absent a showing that the false statements at issue were made with "'actual malice.'" 376 U. S., at 279–280. We stated there that the First Amendment expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*, at 270. See *Garrison* v. *Louisiana*, *supra*, at 76.

In *Pickering* we held that the First Amendment affords similar protection to critical statements by a public school teacher directed at the Board of Education for whom he worked. 391 U. S., at 574. In so doing, we recognized that "free and open debate" about the operation of public schools "is vital to informed decision-making by the electorate." *Id.*, at 571–572. We also acknowledged the importance of allowing teachers to speak out on school matters.

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.*, at 572.

See also *Arnett* v. *Kennedy*, 416 U. S. 134, 228 (1974) (MARSHALL, J., dissenting) (describing "[t]he importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors . . .").

Applying these principles, I would hold that Myers' questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital governmental agency, discharges his responsibilities. The questionnaire sought primarily to obtain information about the impact of the recent transfers on morale in the District Attorney's Office. It is beyond doubt that personnel decisions that adversely affect discipline and morale may ultimately impair an agency's efficient performance of its duties. See *Arnett* v. *Kennedy*, *supra*, at 168 (opinion of POWELL, J.). Because I believe the First Amendment protects the right of public employees to discuss such matters so that the public may be better informed about how their elected officials fulfill their responsibilities, I would affirm the District Court's conclusion that the questionnaire related to matters of public importance and concern.

The Court's adoption of a far narrower conception of what subjects are of public concern seems prompted by its fears that a broader view "would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Ante*, at 149. Obviously, not every remark directed at a public official by a public employee is protected by the First Amendment.[3] But deciding whether a particular matter is of public concern is an inquiry that, by its very nature, is a sensitive one for judges charged with interpreting a constitutional provision intended to put "the decision as to what views shall be voiced largely into the hands of each of us . . . ." *Cohen* v. *California*, 403 U. S. 15, 24 (1971).[4] The Court recognized the sensitive nature of this determination in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), which held that the scope of the constitutional privilege in defamation cases turns on whether or not the plaintiff is a public figure, not on whether the statements at issue address a subject of public concern. In so doing, the Court referred to the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not," and expressed "doubt [about] the wisdom of committing this task to the conscience of judges." *Id.*, at 346. See also *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 79 (1971) (MARSHALL, J., dissenting). In making such a delicate inquiry, we must bear in mind that "the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 495 (1975).

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[3] Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

The Court's decision ignores these precepts. Based on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness. The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end. See Part III, *infra.*[5]

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[4] Indeed, it has been suggested that "a classification that bases the right to First Amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the whole idea of the First Amendment." T. Emerson, The System of Freedom of Expression 554 (1970). The degree to which speech is of interest to the public may be relevant in determining whether a public employer may constitutionally be required to tolerate some degree of disruption resulting from its utterance. See *ante*, at 152. In general, however, whether a government employee's speech is of "public concern" must be determined by reference to the broad conception of the First Amendment's guarantee of freedom of speech found necessary by the Framers

> "to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940) (footnote omitted).

See *Wood* v. *Georgia*, 370 U. S. 375, 388 (1962).

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[5] The Court's narrow conception of which matters are of public interest is also inconsistent with the broad view of that concept articulated in our cases dealing with the constitutional limits on liability for invasion of privacy. In *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), we held that a defendant may not constitutionally be held liable for an invasion of privacy resulting from the publication of a false or misleading report of "matters of public interest" in the absence of proof that the report was published with knowledge of its falsity or reckless disregard for its truth. *Id.*, at 389–391. In that action, Hill had sought damages resulting from the publication of an allegedly false report that a new play portrayed the experience of him and his family when they were held hostage in their home in a publicized incident years earlier. We entertained "no doubt that . . . the opening of a new play linked to an actual incident, is a matter of public interest." *Id.*, at 388. See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975) (holding that a radio station could not constitutionally be held liable for broadcasting the name of a rape victim, because the victim's name was contained in public records). Our discussion in *Time, Inc.* v. *Hill* of the breadth of the First Amendment's protections is directly relevant here:

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. . . . 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama*, 310 U. S. 88, 102. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears

III

Although the Court finds most of Myers' questionnaire unrelated to matters of public interest, it does hold that one question—asking whether Assistants felt pressured to work in political campaigns on behalf of office-supported candidates—addressed a matter of public importance and concern. The Court also recognizes that this determination of public interest must weigh heavily in the balancing of competing interests required by *Pickering*. Having gone that far, however, the Court misapplies the *Pickering* test and holds—against our previous authorities—that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears are essentially unfounded.

Pickering recognized the difficulty of articulating "a general standard against which all . . . statements may be judged," 391 U. S., at 569; it did, however, identify a number of factors that may affect the balance in particular cases. Those relevant here are whether the statements are directed to persons with whom the speaker "would normally be in contact in the course of his daily work"; whether they had an adverse effect on "discipline by immediate superiors or harmony among coworkers"; whether the employment relationship in question is "the kind . . . for which it can per-

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an inverse ratio to the timeliness and importance of the ideas seeking expression.' *Bridges* v. *California*, 314 U. S. 252, 269." 385 U. S., at 388.

The quoted passage makes clear that, contrary to the Court's view, *ante*, at 143, n. 5, the subjects touched upon in respondent's questionnaire fall within the broad conception of "matters of public interest" that defines the scope of the constitutional privilege in invasion of privacy cases. See Restatement (Second) of Torts § 652D, Comment *j* (1977):

> "The scope of a matter of legitimate concern to the public is not limited to 'news,' in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."

suasively be claimed that personal loyalty and confidence are necessary to their proper functioning"; and whether the statements "have in any way either impeded [the employee's] proper performance of his daily duties . . . or . . . interfered with the regular operation of the [office]." *Id.*, at 568–573. In addition, in *Givhan*, we recognized that when the statements in question are made in private to an employee's immediate supervisor, "the employing agency's institutional efficiency may be threatened not only by the content of the . . . message but also by the manner, time, and place in which it is delivered." 439 U. S., at 415, n. 4. See *supra*, at 159.

The District Court weighed all of the relevant factors identified by our cases. It found that petitioner failed to establish that Myers violated either a duty of confidentiality or an office policy. 507 F. Supp., at 758–759. Noting that most of the copies of the questionnaire were distributed during lunch, it rejected the contention that the distribution of the questionnaire impeded Myers' performance of her duties, and it concluded that "Connick has not shown *any* evidence to indicate that the plaintiff's work performance was adversely affected by her expression." *Id.*, at 754–755, 759 (emphasis supplied).

The Court accepts all of these findings. See *ante*, at 151. It concludes, however, that the District Court failed to give adequate weight to the context in which the questionnaire was distributed and to the need to maintain close working relationships in the District Attorney's Office. In particular, the Court suggests the District Court failed to give sufficient weight to the disruptive potential of Question 10, which asked whether the Assistants had confidence in the word of five named supervisors. *Ante*, at 152. The District Court, however, explicitly recognized that this was petitioner's "most forceful argument"; but after hearing the testimony of four of the five supervisors named in the question, it found that the question had no adverse effect on Myers' relationship with her superiors. 507 F. Supp., at 759.

To this the Court responds that an employer need not wait until the destruction of working relationships is manifest before taking action. In the face of the District Court's finding that the circulation of the questionnaire had no disruptive effect, the Court holds that respondent may be dismissed because petitioner "reasonably believed [the action] would disrupt the office, undermine his authority, and destroy close working relationships." *Ante*, at 154. Even though the District Court found that the distribution of the questionnaire did not impair Myers' working relationship with her supervisors, the Court bows to petitioner's judgment because "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Ante*, at 151–152.

Such extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning the operations of the agency for which they work. Although an employer's determination that an employee's statements have undermined essential working relationships must be carefully weighed in the *Pickering* balance, we must bear in mind that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U. S., at 574. See *Keyishian* v. *Board of Regents*, 385 U. S., at 604. If the employer's judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors. In order to protect public employees' First Amendment right to voice critical views on issues of public importance, the courts must make their own appraisal of the effects of the speech in question.

In this regard, our decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969), is controlling. *Tinker* arose in a public school, a context similar to the one in which the present case arose in that the determination of the scope of the Constitution's guarantee of freedom of speech required consideration of the "special characteristics of the . . . environment" in which the expression took place. See *id.*, at 506. At issue was whether public high school students could constitutionally be prohibited from wearing black armbands in school to express their opposition to the Vietnam conflict. The District Court had ruled that such a ban "was reasonable because it was based upon [school officials'] fear of a disturbance from the wearing of armbands." *Id.*, at 508. We found that justification inadequate, because "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Ibid.* We concluded:

> "In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.*" *Id.*, at 509 (emphasis supplied) (quoting *Burnside* v. *Byars*, 363 F. 2d 744, 749 (CA5 1966)).

Because the speech at issue addressed matters of public importance, a similar standard should be applied here. After reviewing the evidence, the District Court found that "it cannot be said that the defendant's interest in promoting the efficiency of the public services performed through his employees was either adversely affected or substantially impeded by plaintiff's distribution of the questionnaire." 507 F. Supp., at 759. Based on these findings the District Court concluded that the circulation of the questionnaire was protected by the First Amendment. The District Court applied the proper legal standard and reached an acceptable accommodation between the competing interests. I would affirm its decision and the judgment of the Court of Appeals.

IV

The Court's decision today inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal. As a result, the public will be deprived of valuable information with which to evaluate the performance of elected officials. Because protecting the dissemination of such information is an essential function of the First Amendment, I dissent.

UNITED STATES ET AL. *v.* GRACE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1863. Argued January 18, 1983—Decided April 20, 1983

Title 40 U. S. C. § 13k prohibits the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the United States Supreme Court building or on its grounds, which are defined to include the public sidewalks constituting the outer boundaries of the grounds. One appellee was threatened with arrest by Court police officers for violation of the statute when he distributed leaflets concerning various causes on the sidewalk in front of the Court. The other appellee was similarly threatened with arrest for displaying on the sidewalk a picket sign containing the text of the First Amendment. Appellees then filed suit in Federal District Court, seeking an injunction against enforcement of § 13k and a declaratory judgment that it was unconstitutional on its face. The District Court dismissed the complaint for failure to exhaust administrative remedies. The Court of Appeals, after determining that such dismissal was erroneous, struck down § 13k on its face as an unconstitutional restriction on First Amendment rights in a public place.

Held: Section 13k, as applied to the public sidewalks surrounding the Court building, is unconstitutional under the First Amendment. Pp. 175-184.

(a) The conduct of each appellee falls into the statutory ban, and hence it is proper to reach the constitutional question involved. Pp. 175-176.

(b) As a general matter, peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment. "Public places," such as streets, sidewalks, and parks, historically associated with the free exercise of expressive activities, are considered, without more, to be "public forums." In such places, the Government may enforce reasonable time, place, and manner regulations, but additional restrictions, such as an absolute prohibition of a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest. Pp. 176-178.

(c) The Court grounds are not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and is admitted to the building during specified hours. But where the sidewalks forming the perimeter of the grounds are indistinguishable from any other sidewalks in Washington,

D. C., they should not be treated any differently and thus are public forums for First Amendment purposes. Pp. 178–180.

(d) Insofar as it totally bans specified communicative activity on the public sidewalks around the Court grounds, § 13k cannot be justified as a reasonable place restriction. A total ban on carrying a flag, banner, or device on the public sidewalks does not substantially serve the purposes of the statute of which § 13k is a part to provide for the maintenance of law and order on the Court grounds. Nor do § 13k's prohibitions here at issue sufficiently serve the averred purpose of protecting the Court from outside influence or preventing it from appearing to the public that the Court is subject to such influence or that picketing or marching is an acceptable way of influencing the Court, where, as noted, the public sidewalks surrounding the Court grounds are no different than other public sidewalks in the city. Pp. 180–183.

214 U. S. App. D. C. 375, 665 F. 2d 1193, affirmed in part and vacated in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., *post*, p. 184, and STEVENS, J., *post*, p. 188, filed opinions concurring in part and dissenting in part.

Solicitor General Lee argued the cause for appellants. With him on the briefs were *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *David A. Strauss*, *Anthony J. Steinmeyer*, and *Marc Richman*.

Sebastian K. D. Graber argued the cause for appellees. With him on the brief were *Norman A. Townsend* and *Bradley S. Stetler*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case we must determine whether 40 U. S. C. § 13k, which prohibits, among other things, the "display [of] any flag, banner, or device designed or adapted to bring into pub-

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**A. Stephen Hut, Jr.*, *Arthur B. Spitzer*, and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Robert L. Gnaizda and *Sidney M. Wolinsky* filed a brief for the League of United Latin American Citizens as *amicus curiae*.

lic notice any party, organization, or movement"[1] in the United States Supreme Court building and on its grounds, violates the First Amendment.

I

In May 1978 appellee Thaddeus Zywicki, standing on the sidewalk in front of the Supreme Court building, distributed leaflets to passersby. The leaflets were reprints of a letter to the editor of the Washington Post from a United States Senator concerning the removal of unfit judges from the bench. A Supreme Court police officer approached Zywicki and told him, accurately, that Title 40 of the United States Code prohibited the distribution of leaflets on the Supreme Court grounds, which includes the sidewalk. Zywicki left.

In January 1980 Zywicki again visited the sidewalk in front of the Court to distribute pamphlets containing information about forthcoming meetings and events concerning "the oppressed peoples of Central America." Zywicki again was approached by a Court police officer and was informed that the distribution of leaflets on the Court grounds was prohibited by law. The officer indicated that Zywicki would be arrested if the leafletting continued. Zywicki left.

Zywicki reappeared in February 1980 on the sidewalk in front of the Court and distributed handbills concerning oppression in Guatemala. Zywicki had consulted with an attorney concerning the legality of his activities and had been informed that the Superior Court for the District of Columbia had construed the statute that prohibited leafletting, 40 U. S. C. § 13k, to prohibit only conduct done with the specific intent to influence, impede, or obstruct the administration of justice.[2] Zywicki again was told by a Court police officer that he would be subject to arrest if he persisted in his leafletting. Zywicki complained that he was being denied a right that others were granted, referring to the newspaper vending machines located on the sidewalk. Nonetheless, Zywicki left the grounds.

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[1] The provision at issue in this case is part of a statutory scheme enacted in 1949 to govern the protection, care, and policing of the Supreme Court grounds. In its entirety § 13k provides:

"It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 63 Stat. 617.

Around noon on March 17, 1980, appellee Mary Grace entered upon the sidewalk in front of the Court and began to display a four foot by two and a half foot sign on which was inscribed the verbatim text of the First Amendment. A Court police officer approached Grace and informed her that she would have to go across the street if she wished to display the sign. Grace was informed that Title 40 of the United States Code prohibited her conduct and that if she did not cease she would be arrested. Grace left the grounds.

On May 13, 1980, Zywicki and Grace filed the present suit in the United States District Court for the District of Columbia. They sought an injunction against continued enforcement of 40 U. S. C. § 13k and a declaratory judgment that the statute was unconstitutional on its face. On August 7, 1980, the District Court dismissed the complaint for failure to exhaust administrative remedies.[3] Appellees took an appeal, arguing that the District Court's action was improper and that the Court of Appeals should grant the relief requested in the complaint.

The Court of Appeals determined that the District Court's dismissal for failure to exhaust administrative remedies was erroneous and went on to strike down § 13k on its face as an unconstitutional restriction on First Amendment rights in a public place.[4] *Grace* v. *Burger*, 214 U. S. App. D. C. 375, 665 F. 2d 1193 (1981).

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[2] The case Zywicki's counsel referred to is *United States* v. *Ebner*, No. M-12487-79 (D. C. Super. Ct., Jan. 22, 1980). The case is currently on appeal to the District of Columbia Court of Appeals; that court has postponed decision pending the outcome of the present appeal.

[3] *Grace* v. *Burger*, 524 F. Supp. 815 (1980).

The Government appealed from the Court of Appeals' judgment. We noted probable jurisdiction, 457 U. S. 1131 (1982).

II

Section 13k prohibits two distinct activities: it is unlawful either "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," or "to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Each appellee appeared individually on the public sidewalks to engage in expressive activity, and it goes without saying that the threat of arrest to which each appellee was subjected was for violating the prohibition against the display of a "banner or device." Accordingly, our review is limited to the latter portion of the statute.[5] Likewise, the controversy presented by appellees concerned their right to use the public sidewalks surrounding the Court building for the communicative activities they sought to carry out, and we shall address only whether the proscriptions of § 13k are constitutional as applied to the public sidewalks.

Our normal course is first to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). See *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982). Appellees did not make a statutory construction argument before the lower courts, but at oral argument, the question was raised whether § 13k reached the types of conduct in which appellees engaged, and we should answer it. We agree with the United States that the statute covers the particular conduct of Zywicki or Grace and that it is therefore proper to reach the constitutional question involved in this case.

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[4] The court justified its action in this regard by relying primarily on the fact that the case presented a pure question of law that had been fully briefed and argued by the parties both in the District Court and in the Court of Appeals. Because the appellants do not take issue with the propriety of the Court of Appeals' action in addressing the merits rather than remanding to the District Court, we will assume that such action was proper without deciding that question. Cf. *Singleton* v. *Wulff*, 428 U. S. 106 (1976).

[5] Although the Court of Appeals opinion purports to hold § 13k unconstitutional on its face without any indication that the holding is limited to that portion of the statute that deals with the display of a "flag, banner, or device," the decision must be read as limited to that prohibition.

The statutory ban is on the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U. S. C. § 13k. It is undisputed that Grace's picket sign containing the text of the First Amendment falls within the description of a "flag, banner, or device." Although it is less obvious, it is equally uncontested that Zywicki's leaflets fall within the proscription as well.

We also accept the Government's contention, not contested by appellees, that almost any sign or leaflet carrying a communication, including Grace's picket sign and Zywicki's leaflets, would be "designed or adapted to bring into public notice [a] party, organization or movement." Such a construction brings some certainty to the reach of the statute and hence avoids what might be other challenges to its validity.

III

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[6] There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment. *E. g.*, *Carey* v. *Brown*, 447

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[6] The First Amendment provides in full:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U. S. 455, 460 (1980); *Gregory* v. *Chicago*, 394 U. S. 111, 112 (1969); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939).

It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." See *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983); *Carey* v. *Brown*, *supra*, at 460; *Hudgens* v. *NLRB*, 424 U. S. 507, 515 (1976); *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941); *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn.*, *supra*, at 45. See, *e. g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647, 654 (1981); *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); *Cox* v. *Louisiana*, 379 U. S. 559 (1965) *(Cox II)*. Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest. See, *e. g.*, *Perry Education Assn.*, *supra*, at 46; *Widmar* v. *Vincent*, 454 U. S. 263 (1981).

Publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will. See *Greer* v. *Spock*, 424 U. S. 828, 836 (1976). Although whether the property has been "generally opened to the public" is a factor to consider in determining whether the government has opened its property to the use of the people for communicative purposes, it is not determinative of the question. We have regularly rejected the assertion that people who wish "to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U. S. 39, 47–48 (1966). See, *e. g.*, *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965) *(Cox I)*; *Cox II*, *supra*, at 563–564. There is little doubt that in some circumstances the government may ban the entry on to public property that is not a "public forum" of all persons except those who have legitimate business on the premises. The government, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, *supra*, at 47. See *Cox II*, *supra*, at 563–564.

IV

It is argued that the Supreme Court building and grounds fit neatly within the description of nonpublic forum property. Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. As *Greer* v. *Spock*, *supra*, teaches, the property is not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours.[7] Under this view it would be necessary only to determine that the restrictions imposed by § 13k are reasonable in light of the use to which the building and grounds are dedicated and that there is no discrimination on the basis of content. We need not make that judgment at this time, however, because § 13k covers the public sidewalks as well as the building and grounds inside the sidewalks. As will become evident, we hold that § 13k may not be applied to the public sidewalks.

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[7] The limitation on the hours during which the public is permitted in the Supreme Court building is the only regulation promulgated under 40 U. S. C. § 13*l*. The regulation provides:

"The Supreme Court Building at 1 First Street, N. E., Washington, D. C. 20543, is open to the public Monday through Friday, from 9 a. m. to 4:30 p. m., except on Federal holidays. The building is closed at all other times, although persons having legitimate business may be admitted at other times when so authorized by responsible officials."

The prohibitions imposed by § 13k technically cover the entire grounds of the Supreme Court as defined in 40 U. S. C. § 13p.[8] That section describes the Court grounds as extending to the curb of each of the four streets enclosing the block on which the building is located. Included within this small geographical area, therefore, are not only the building, the plaza and surrounding promenade, lawn area, and steps, but also the sidewalks. The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D. C., and we can discern no reason why they should be treated any differently.[9] Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer* v. *Spock*, *supra*. In *Greer*, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N. J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave. In *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 133 (1981), we stated that "Congress . . . may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums . . . ." The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property. The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be treated as such for First Amendment purposes.

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[8] Section 13p provides:

"For the purposes of sections 13f to 13p of this title the Supreme Court grounds shall be held to extend to the line of the face of the east curb of First Street Northeast, between Maryland Avenue Northeast and East Capitol Street; to the line of the face of the south curb of Maryland Avenue Northeast, between First Street Northeast and Second Street Northeast; to the line of the face of the west curb of Second Street Northeast, between Maryland Avenue Northeast and East Capitol Street; and to the line of the face of the north curb of East Capitol Street between First Street Northeast and Second Street Northeast."

[9] Because the prohibitions of § 13k are expressly made applicable to the entire grounds under § 13p, the statute cannot be construed to exclude the sidewalks. Thus we must consider Congress' extension of § 13k's prohibitions to the sidewalks to be a reasoned choice.

V

The Government submits that § 13k qualifies as a reasonable time, place, and manner restriction which may be imposed to restrict communicative activities on public forum property such as sidewalks. The argument is that the inquiry should not be confined to the Supreme Court grounds but should focus on "the vicinity of the Supreme Court" or "the public places of Washington, D. C." Brief for Appellants 16, n. 5. Viewed in this light, the Government contends that there are sufficient alternative areas within the relevant forum, such as the streets around the Court or the sidewalks across those streets to permit § 13k to be considered a reasonable "place" restriction having only a minimal impact on expressive activity. We are convinced, however, that the section, which totally bans the specified communicative activity on the public sidewalks around the Court grounds,[10] cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests that may be thought to undergird § 13k. Our reasons for this conclusion will become apparent below, where we decide that § 13k, insofar as its prohibitions reach to the public sidewalks, is unconstitutional because it does not sufficiently serve those public interests that are urged as its justification.

Section 13k was part of an 11-section statute, enacted in 1949, "[r]elating to the policing of the building and grounds of the Supreme Court of the United States." 63 Stat. 616, 40 U. S. C. §§ 13f–13p. The occasion for its passage was the termination of the practice by District of Columbia authorities of appointing Supreme Court guards as special policemen for the District. This action left the Supreme Court police force without authority to make arrests and enforce the law in the building and on the grounds of the Court. The Act, which was soon forthcoming, was modeled on the legislation relating to the Capitol grounds, 60 Stat. 718, 40 U. S. C. §§ 193a–193m. It authorizes the appointment by the Marshal of special officers "for duty in connection with the policing of the Supreme Court Building and grounds and adjacent streets." Sections 2–6 of the Act prohibit certain kinds of conduct in the building or grounds. Section 6, codified as 40 U. S. C. § 13k, is at issue here. Other sections authorize the Marshal to issue regulations, provide penalties for violations of the Act or regulations, and authorize the Court's special police to make arrests for violation of the Act's prohibitions or of any law of the United States occurring within the building and grounds and on the adjacent streets. Section 11 of the Act, 13 U. S. C. § 13p, defines the limits of the Court's grounds as including the sidewalks surrounding the building.

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[10] Section 13k does not prohibit *all* expressive conduct: it does not, for example, purport to prohibit any oral expression, on any subject. It is unnecessary, however, to determine what conduct other than the picketing and leafletting at issue here may be fairly within the terms of the statute because the statute at least prohibits the conduct at issue here. We do note that the current Marshal of the Court has interpreted and applied the statute to prohibit picketing and leafletting, but not other expressive conduct. See *Grace* v. *Burger*, 214 U. S. App. D. C. 375, 378, n. 7, 665 F. 2d 1193, 1196, n. 7 (1981). Interpreted and applied as an absolute ban on these two types of expressive conduct, it is clear that the prohibition is facially content-neutral.

Based on its provisions and legislative history, it is fair to say that the purpose of the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum. Section 6, 40 U. S. C. § 13k, was one of the provisions apparently designed for these purposes. At least, no special reason was stated for its enactment.

We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes. There is no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds. As we have said, the building's perimeter sidewalks are indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here and that § 13k forbids. A total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city. Accordingly, § 13k cannot be justified on this basis.

The United States offers another justification for § 13k that deserves our attention. It is said that the federal courts represent an independent branch of the Government and that their decisionmaking processes are different from those of the other branches. Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups. Neither, the Government urges, should it *appear* to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court. Hence, we are asked to hold that Congress was quite justified in preventing the conduct in dispute here from occurring on the sidewalks at the edge of the Court grounds.

As was the case with the maintenance of law and order on the Court grounds, we do not discount the importance of this proffered purpose for § 13k. But, again, we are unconvinced that the prohibitions of § 13k that are at issue here sufficiently serve that purpose to sustain its validity insofar as the public sidewalks on the perimeter of the grounds are concerned. Those sidewalks are used by the public like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city. We seriously doubt that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street.

We thus perceive insufficient justification for § 13k's prohibition of carrying signs, banners, or devices on the public sidewalks surrounding the building. We hold that under the First Amendment the section is unconstitutional as applied to those sidewalks. Of course, this is not to say that those sidewalks, like other sidewalks, are not subject to reasonable time, place, and manner restrictions, either by statute or by regulations issued pursuant to 40 U. S. C. § 13*l*.

The judgment below is accordingly affirmed to the extent indicated by this opinion and is otherwise vacated.

So ordered.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I would hold 40 U. S. C. § 13k unconstitutional on its face. The statute in no way distinguishes the sidewalks from the rest of the premises, and excising the sidewalks from its purview does not bring it into conformity with the First Amendment. Visitors to this Court do not lose their First Amendment rights at the edge of the sidewalks any more than "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 506 (1969). Since the continuing existence of the statute will inevitably have a chilling effect on freedom of expression, there is no virtue in deciding its constitutionality on a piecemeal basis.

When a citizen is "in a place where [he] has every right to be," *Brown* v. *Louisiana*, 383 U. S. 131, 142 (1966) (opinion of Fortas, J., joined by Warren, C. J., and Douglas, J.), he cannot be denied the opportunity to express his views simply because the Government has not chosen to designate the area as a forum for public discussion. While the right to conduct expressive activities in such areas as streets, parks, and sidewalks is reinforced by their traditional use for purposes of assembly, *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.), that right ultimately rests on the principle that "one who is rightfully on a street which the state has left open to the public carries with him there *as elsewhere* the constitutional right to express his views in an orderly fashion." *Jamison* v. *Texas*, 318 U. S. 413, 416 (1943) (emphasis added). Every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question, whether that place is a school,[1] a library,[2] a private lunch counter,[3] the grounds of a statehouse,[4] the grounds of the United States Capitol,[5] a bus terminal,[6] an airport,[7] or a welfare center.[8] As we stated in *Grayned* v. *City of Rockford*, 408 U. S. 104, 116 (1972), "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

I see no reason why the premises of this Court should be exempt from this basic principle. It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution that has the chief responsibility for protecting constitutional rights. I would apply to the premises of this Court the same principle that this Court has applied to other public places.

Viewed in this light, 40 U. S. C. § 13k is plainly unconstitutional on its face. The statute is not a reasonable regulation of time, place, and manner, cf., *e. g., Kovacs* v. *Cooper*, 336 U. S. 77, 87–89 (1949); *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941), for it applies at all times, covers the entire premises, and, as interpreted by the Court, proscribes even the handing out of a leaflet and, presumably, the wearing of a campaign button as well.[9]

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[1] *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 512–513 (1969).

[2] *Brown* v. *Louisiana*, 383 U. S. 131, 142 (1966); *id.*, at 146, and n. 5 (BRENNAN, J., concurring in judgment).

[3] *Garner* v. *Louisiana*, 368 U. S. 157, 201–202 (1961) (Harlan, J., concurring in judgment).

[4] *Edwards* v. *South Carolina*, 372 U. S. 229 (1963).

[5] *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (DC), summarily aff'd, 409 U. S. 972 (1972).

[6] *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (CA2), cert. denied, 393 U. S. 940 (1968).

[7] *Chicago Area Military Project* v. *City of Chicago*, 508 F. 2d 921 (CA7), cert. denied, 421 U. S. 992 (1975); *Kuszynski* v. *City of Oakland*, 479 F. 2d 1130 (CA9 1973).

[8] *Albany Welfare Rights Organization* v. *Wyman*, 493 F. 2d 1319 (CA2), cert. denied, 419 U. S. 838 (1974).

Nor does the statute merely forbid conduct that is incompatible with the primary activity being carried out in this Court. Cf. *Grayned* v. *City of Rockford, supra,* at 116; *Greer* v. *Spock*, 424 U. S. 828, 843 (1976) (POWELL, J., concurring). In contrast to 18 U. S. C. § 1507 (1976 ed., Supp. V) and the statute upheld in *Cox* v. *Louisiana*, 379 U. S. 559 (1965),[10] 40 U. S. C. § 13k is not limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice. In *Cox* the Court stressed that a prohibition of expression "unrelated to any judicial proceedings" would raise "entirely different considerations." 379 U. S., at 567. The statute at issue here is a far cry from

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[9] Separate provisions of the United States Code also make it a crime to solicit contributions or give a speech on the premises. 40 U. S. C. §§ 13h and 13j.

[10] Title 18 U. S. C. § 1507 (1976 ed., Supp. V) provides in pertinent part:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, . . . or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building . . . shall be fined not more than $5,000 or imprisoned for not more than one year, or both."

The Louisiana statute upheld on its face in *Cox* provided in pertinent part:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year, or both." La. Rev. Stat. § 14:401 (Supp. 1962).

S. C. § 1507 (1976 ed., Supp. V) and the statute
'ox, for it imposes a blanket prohibition on the
"*any* flag, banner, or device designed or adapted
ɔ public notice any party, organization, or move-
mphasis added.) The application of the statute
pend upon whether the flag, banner, or device in
ncerns a case before this Court. So sweeping a
s scarcely necessary to protect the operations of
and in my view cannot constitutionally be applied
e Court grounds or to the areas inside the Court
t are open to the public.

nerefore hold the prohibition unconstitutional on
We have repeatedly recognized that a statute
ps within its ambit a broad range of expression
the First Amendment should be struck down on
'The existence of such a statute . . . results in a
and pervasive restraint on all freedom of discus-

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h the Court that the clause of 40 U. S. C. § 13k prohibiting
assemblages is not before us, since neither of the appellees
rocession or assemblage.

ed States v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board*
5 U. S. 589, 604, 609–610 (1967); *Elfbrandt* v. *Russell*, 384
1966); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965);
labama, 310 U. S. 88, 97–98 (1940); *Lovell* v. *Griffin*, 303
(1938).

rotect third parties not before the Court, we have held that
t whose own activities are *unprotected* may nevertheless
atute by showing that it substantially abridges the First
ghts of other parties not before the court." *Schaumburg* v.
Better Environment, 444 U. S. 620, 634 (1980) (emphasis
, *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975);
of New Orleans, 415 U. S. 130 (1974); *Broadrick* v. *Okla-*
S. 601 (1973); *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Kunz*
340 U. S. 290 (1951); *NAACP* v. *Button*, 371 U. S. 415,
If such a showing is made, the statute will be struck down

d statute should likewise be struck down on its face where,
allenged by litigants whose own activities are constitution-

sion that might reasonably be regarded as within its purview." *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940) (footnote omitted). As JUSTICE BRENNAN stated in his opinion for the Court in *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), First Amendment freedoms "are delicate and vulnerable," and "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." I would not leave visitors to this Court subject to the continuing threat of imprisonment[13] if they dare to exercise their First Amendment rights once inside the sidewalks.

JUSTICE STEVENS, concurring in part and dissenting in part.

On three occasions Zywicki distributed leaflets and handbills. I would not construe that activity as the "display" of any "flag, banner, or device." A typical passerby would not have learned Zywicki's message from the "display" of his literature. Only after the material left Zywicki's possession would his message have become intelligible.

On one occasion Grace carried a sign on which the text of the First Amendment was written. I agree that this was the "display" of a "device," but I do not agree that her device was "designed or adapted to bring into public notice any party, organization, or movement." A typical passerby could not, merely by observing her sign, confidently link her with any specific party, organization, or "movement" as that term was understood when this statute was drafted.*

I see no reason to stretch the language of the statute to encompass the activities of either Zywicki or Grace. As a matter of statutory interpretation, we should not infer that

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[13] A person who violates the statute is subject to imprisonment for 60 days or a $100 fine, or both. 40 U. S. C. § 13m.

*"A course or series of actions and endeavours on the part of a body of persons, moving or tending more or less continuously towards some special end." 6 Oxford English Dictionary 729 (1933) ("movement," definition 6). See also Webster's International Dictionary 1604 (2d ed. 1934) ("movement," definition 4).

Congress intended to abridge free expression in circumstances not plainly covered by the language of the statute. As a matter of judicial restraint, we should avoid the unnecessary adjudication of constitutional questions.

Because neither of the appellees has violated the statute, I would affirm the judgment of the Court of Appeals to the extent that it requires that appellants be restrained from causing appellees' arrest for engaging in the activities disclosed by this record.

PACIFIC GAS & ELECTRIC CO. ET AL. *v.* STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1945. Argued January 17, 1983—Decided April 20, 1983

Section 25524.1(b) of the California Public Resources Code provides that before a nuclear powerplant may be built, the State Energy Resources Conservation and Development Commission must determine on a case-by-case basis that there will be "adequate capacity" for interim storage of the plant's spent fuel at the time the plant requires such storage. Section 25524.2 imposes a moratorium on the certification of new nuclear plants until the State Commission finds that there has been developed, and that the United States through its authorized agency has approved, a demonstrated technology or means for the permanent and terminal disposal of high-level nuclear wastes. Petitioner electric utilities filed an action in Federal District Court seeking a declaration that these provisions, *inter alia*, are invalid under the Supremacy Clause because they were pre-empted by the Atomic Energy Act of 1954. The District Court, after finding that the issues presented by the two provisions were ripe for adjudication, held that they were pre-empted by and in conflict with the Atomic Energy Act. The Court of Appeals agreed that the challenge to § 25524.2 was ripe for review, but found that the challenge to § 25524.1(b) was not because it could not be known whether the State Commission will ever find a nuclear plant's storage capacity to be inadequate. The court went on to hold that § 25524.2 was not designed to provide protection against radiation hazards but was adopted because uncertainties in the nuclear fuel cycle make nuclear power an uneconomical and uncertain source of energy, and therefore that the section was not pre-empted because §§ 271 and 274(k) of the Atomic Energy Act constituted authorization for States to regulate nuclear powerplants for purposes other than protection against radiation hazards. The court further held that § 25524.2 was not invalid as a barrier to fulfillment of the federal goal of encouraging the development of atomic energy.

Held:

1. The challenge to § 25524.2 is ripe for judicial review, but the questions concerning § 25524.1(b) are not. Pp. 200–203.

(a) The question of ripeness turns "on the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149. Both of these factors counsel in favor of finding the challenge to § 25524.2 ripe for adjudication. The question of pre-emption is predominantly legal and to require the industry to proceed without knowing whether the moratorium imposed by § 25524.2 is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California. Moreover, if § 25524.2 is void as hindering commercial development of atomic energy, delayed resolution would frustrate one of the key purposes of the Atomic Energy Act. Pp. 200–202.

(b) Under circumstances where it is uncertain whether the State Commission will ever find a nuclear plant's interim storage capacity to be inadequate, and where, because of this Court's holding, *infra*, that § 25524.2 is not pre-empted by federal law, it is unlikely that industry behavior would be uniquely affected by such uncertainty surrounding the interim storage provision, a court should not stretch to reach an early, and perhaps a premature, decision respecting § 25524.1(b). P. 203.

2. Section 25524.2 is not pre-empted by the Atomic Energy Act. Pp. 203–223.

(a) From the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation, whereas the States exercise their traditional authority over economic questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and ratemaking. This Court accepts California's avowed economic rather than safety purpose as the rationale for enacting § 25524.2, and accordingly the statute lies outside the federally occupied field of nuclear safety regulation. Pp. 205–216.

(b) Section 25524.2 does not conflict with federal regulation of nuclear waste disposal, with the decision of the Nuclear Regulatory Commission (NRC) that it is permissible to continue to license reactors, notwithstanding uncertainty surrounding the waste disposal problem, or with Congress' recent passage of the Nuclear Waste Policy Act of 1982 directed at that problem. Because the NRC's decision does not and could not compel a utility to develop a nuclear plant, compliance with both that decision and § 25524.2 is possible. Moreover, because the NRC's regulations are aimed at insuring that plants are safe, not necessarily that they are economical, § 25524.2 does not interfere with the objective of those regulations. And as there is no attempt on California's part to enter the field of developing and licensing nuclear waste disposal technology, a field occupied by the Federal Government, § 25524.2 is not pre-empted any more by the NRC's obligations in the waste disposal field than by its licensing power over the plants themselves. Nor does it appear that Congress intended through the Nuclear Waste Policy Act of 1982 to make the decision for the States as to whether there is now sufficient federal commitment to fuel storage and waste disposal that licensing of nuclear reactors may resume. Morover, that Act can be interpreted as being directed at solving the nuclear waste disposal problem for existing reactors without necessarily encouraging or requiring that future plant construction be undertaken. Pp. 217–220.

(c) Section 25524.2 does not frustrate the Atomic Energy Act's purpose to develop the commercial use of nuclear power. Promotion of nuclear power is not to be accomplished "at all costs." Moreover, Congress has given the States authority to determine, as a matter of economics, whether a nuclear plant vis-à-vis a fossil fuel plant should be built. California's decision to exercise that authority does not, in itself, constitute a basis for pre-emption. Pp. 220–223.

659 F. 2d 903, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS, J., joined, *post*, p. 223.

John R. McDonough argued the cause for petitioners. With him on the briefs was *Howard B. Soloway*.

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *John H. Garvey*, *Leonard Schaitman*, and *Al J. Daniel, Jr.*

Laurence H. Tribe argued the cause for respondents. With him on the brief were *Roger Beers*, *William M. Chamberlain*, *Dian Grueneich*, and *Ralph Cavanagh*.*

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*Briefs of *amici curiae* urging reversal were filed by *Leonard M. Trosten*, *Eugene R. Fidell*, and *Linda L. Hodge* for the Atomic Industrial Forum; by *John M. Cannon* and *Susan W. Wanat* for Hans A. Bethe et al.; by *Joseph B. Knotts, Jr.*, and *Robert L. Baum* for the Edison Electric Institute; by *Max Dean* for the Fusion Energy Foundation; by *David Crump* and *Wilkes Robinson* for the Legal Foundation of America; and by *Ronald A. Zumbrun*, *Robin L. Rivett*, *Raymond M. Momboisse*, and *Sam Kazman* for the Pacific Legal Foundation et al.

JUSTICE WHITE delivered the opinion of the Court.

The turning of swords into plowshares has symbolized the transformation of atomic power into a source of energy in

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Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Robert Abrams*, Attorney General of New York, *Peter H. Schiff*, and *Ezra I. Bialik*, Assistant Attorney General; *Wilson L. Condon*, Attorney General of Alaska, and *Douglas K. Mertz*, Assistant Attorney General; *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General; *John Steven Clark*, Attorney General of Arkansas; *Tany S. Hong*, Attorney General of Hawaii, and *Michael A. Lilly*, First Deputy Attorney General; *Robert T. Stephan*, Attorney General of Kansas, *Robert Vinson Eye*, Assistant Attorney General, and *Brian J. Moline; William J. Guste, Jr.*, Attorney General of Louisiana, and *Kendall L. Vick*, Assistant Attorney General; *Warren Spannaus*, Attorney General of Minnesota, and *Jocelyn F. Olson*, Special Assistant Attorney General; *Bill Allain*, Attorney General of Mississippi, and *Mack Cameron*, Special Assistant Attorney General; *Mike Greely*, Attorney General of Montana, and *Mike McGrath*, Assistant Attorney General; *Richard H. Bryan*, Attorney General of Nevada, and *Larry Struve*, Chief Deputy Attorney General; *William J. Brown*, Attorney General of Ohio, and *E. Dennis Muchnicki*, Assistant Attorney General; *Jan Eric Cartwright*, Attorney General of Oklahoma, and *Sara J. Drake*, Assistant Attorney General; *Daniel R. McLeod*, Attorney General of South Carolina, and *Richard P. Wilson*, Assistant Attorney General; *John J. Easton, Jr.*, Attorney General of Vermont, and *Merideth Wright*, Assistant Attorney General; *Chauncey H. Browning*, Attorney General of West Virginia, and *Robert R. Rodecker; Steven F. Freudenthal*, Attorney General of Wyoming, and *Walter Perry III*, Senior Assistant Attorney General; for the State of Connecticut by *Carl R. Ajello*, Attorney General, *Robert S. Golden, Jr.*, Assistant Attorney General, and *Neil T. Proto*, Special Assistant Attorney General; for the State of Maine by *James E. Tierney*, Attorney General, *Rufus E. Brown*, Deputy Attorney General, *H. Cabanne Howard*, Senior Assistant Attorney General, and *Gregory W. Sample*, Assistant Attorney General; for the Commonwealth of Massachusetts by *Francis X. Bellotti*, Attorney General, and *Stephen M. Leonard*, Assistant Attorney General; for the State of Illinois et al. by *Gregory H. Smith*, Attorney General of New Hampshire, *E. Tupper Kinder*, Assistant Attorney General, *Tyrone C. Fahner*, Attorney General of Illinois, and *John Van Vranken*, *Anne Rapkin*, and *Jeffrey C. Paulson*, Assistant Attorneys General; for the State of Oregon by *Dave Frohnmayer*, Attorney General, *Stanton F. Long*, Deputy Attorney General, *William F. Gary*, Solicitor General, American society. To facilitate this development the Federal Government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the States would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

This case emerges from the intersection of the Federal Government's efforts to ensure that nuclear power is safe with the exercise of the historic state authority over the generation and sale of electricity. At issue is whether provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code Ann. §§25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for nuclear waste,

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James E. Mountain, Jr., Deputy Solicitor General, and *Frank W. Ostrander, Jr.*, Assistant Attorney General; for the State of Washington by *Kenneth O. Eikenberry*, Attorney General, and *Edward B. Mackie*, Chief Deputy Attorney General; for the State of Wisconsin et al. by *Bronson C. La Follette*, Attorney General of Wisconsin, *Steven M. Schur*, and *Carl A. Sinderbrand*, Assistant Attorney General; *Rufus L. Edmisten*, Attorney General of North Carolina; *John Ashcroft*, Attorney General of Missouri; *Steven L. Beshear*, Attorney General of Kentucky; *Richard H. Levin*, Attorney General of New Mexico, and *Geoffrey W. Sloan; Thomas J. Miller*, Attorney General of Iowa, and *James R. Maret; Leroy S. Zimmerman*, Attorney General of Pennsylvania; for the Public Utilities Commission of the State of California et al. by *Janice E. Kerr*, *J. Calvin Simpson*, and *Paul Rodgers*.

Joseph D. Alviani filed a brief for the New England Legal Foundation as *amicus curiae*.

are pre-empted by the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.*

I

A nuclear reactor must be periodically refueled and the "spent fuel" removed. This spent fuel is intensely radioactive and must be carefully stored. The general practice is to store the fuel in a water-filled pool at the reactor site. For many years, it was assumed that this fuel would be reprocessed; accordingly, the storage pools were designed as short-term holding facilities with limited storage capacities. As expectations for reprocessing remained unfulfilled, the spent fuel accumulated in the storage pools, creating the risk that nuclear reactors would have to be shut down. This could occur if there were insufficient room in the pool to store spent fuel and also if there were not enough space to hold the entire fuel core when certain inspections or emergencies required unloading of the reactor. In recent years, the problem has taken on special urgency. Some 8,000 metric tons of spent nuclear fuel have already accumulated, and it is projected that by the year 2000 there will be some 72,000 metric tons of spent fuel.[1] Government studies indicate that a number of reactors could be forced to shut down in the near future due to the inability to store spent fuel.[2]

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[1] See U. S. Congress, Office of Technology Assessment, Managing Commercial High-Level Radioactive Waste 9 (Apr. 1982) (hereafter OTA Study).

[2] "For the past several years the Department of Energy or one of its predecessors has been warning the Congress almost annually of the imminent closure of a number of nuclear power reactors as a result of the lack of available capacity to store the spent nuclear fuel . . . . No reactor has yet shut down for these reasons, largely because utilities have expanded their storage capacity." H. R. Rep. No. 97–785, pt. 1, p. 47 (1982); the Office of Technology Assessment's analysis found that "reactors are running out of storage space, and some may have to shut down by the mid-1990's unless more storage space is made available on a timely basis." OTA Study, at 27. See also Affidavit of Terry R. Lash (staff scientist for Natural Re-

There is a second dimension to the problem. Even with water pools adequate to store safely all the spent fuel produced during the working lifetime of the reactor, permanent disposal is needed because the wastes will remain radioactive for thousands of years.[3] A number of long-term nuclear waste management strategies have been extensively examined. These range from sinking the wastes in stable deep seabeds, to placing the wastes beneath ice sheets in Greenland and Antarctica, to ejecting the wastes into space by rocket. The greatest attention has been focused on disposing of the wastes in subsurface geologic repositories such as salt deposits.[4] Problems of how and where to store nuclear wastes has engendered considerable scientific, political, and public debate. There are both safety and economic aspects to the nuclear waste issue: first, if not properly stored, nuclear wastes might leak and endanger both the environment and human health;[5] second, the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor shutdowns,

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sources Defense Council) ¶ 10, App. 419; Affidavit of Dale G. Bridenbaugh (nuclear engineer) ¶¶ 28–30, App. 478–480.

[3] See H. R. Rep. No. 97–785, *supra*, at 46. "Waste disposal, at the present stage of technological development, refers to the storage of the very long lived and highly radioactive waste products until they detoxify sufficiently that they no longer present an environmental hazard. There are presently no physical or chemical steps which render this waste less toxic, other than simply the passage of time." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 528, n. 6 (1978).

[4] See generally Nuclear Fuel Cycle Committee, California Energy Commission, Status of Nuclear Fuel Reprocessing, Spent Fuel Storage and High-Level Waste Disposal, Draft Report (1978) (App. 173–373); Report to the President by the Interagency Review Group on Nuclear Waste Management 37, 47, 61 (1979).

[5] Committee on Nuclear and Alternative Energy Systems, National Research Council, National Academy of Sciences, Energy in Transition 1985–2010, pp. 314–316 (1979). See also Yellin, High Technology and the Courts, 94 Harv. L. Rev. 489, 534 (1981).

rendering nuclear energy an unpredictable and uneconomical adventure.[6]

The California laws at issue here are responses to these concerns. In 1974, California adopted the Warren-Alquist State Energy Resources Conservation and Development Act, Cal. Pub. Res. Code Ann. §25000–25986 (West 1977 and Supp. 1983). The Act requires that a utility seeking to build in California any electric power generating plant, including a nuclear powerplant, must apply for certification to the State Energy Resources Conservation and Development Commission (Energy Commission).[7] The Warren-Alquist Act was amended in 1976 to provide additional state regulation of new nuclear powerplant construction.

Two sections of these amendments are before us. Section 25524.1(b) provides that before additional nuclear plants may be built, the Energy Commission must determine on a case-by-case basis that there will be "adequate capacity" for storage of a plant's spent fuel rods "at the time such nuclear facility requires such . . . storage." The law also requires that each utility provide continuous, on-site, "full core reserve storage capacity" in order to permit storage of the entire reactor core if it must be removed to permit repairs of the reactor. In short, § 25524.1(b) addresses the interim storage of spent fuel.

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[6] The uncertainty is reflected in the fact that since 1979 the Nuclear Regulatory Commission has been engaged in a proceeding to reassess the evidentiary basis for its position that safety considerations will not be compromised by continuing federal licensing while a waste disposal method is being developed. 44 Fed. Reg. 61373 (1979); see *Minnesota* v. *NRC*, 195 U. S. App. D. C. 234, 241, 602 F. 2d 412, 419 (1979). Moreover, the ultimate solution to the waste disposal problem may entail significant expenditures, affecting the economic attractiveness of the nuclear option.

[7] The applicant must first file a notice of intention to file an application for certification, after which the Commission conducts a review process for not more than 12 months. If the notice of intention is approved, the applicant must then file an application for certification, after which the Commission conducts a further review process not to exceed 18 months. Unless certification is granted, the proposed plant cannot be constructed; if certification is granted the Commission is authorized to make certain specifications for construction of the plant and is directed to monitor the construction process.

Section 25524.2 deals with the long-term solution to nuclear wastes. This section imposes a moratorium on the certification of new nuclear plants until the Energy Commission "finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste." "Disposal" is defined as a "method for the permanent and terminal disposition of high-level nuclear waste . . . ." §§ 25524.2(a), (c). Such a finding must be reported to the state legislature, which may nullify it.[7]

In 1978, petitioners Pacific Gas & Electric Co. and Southern California Edison Co. filed this action in the United States District Court, requesting a declaration that numerous provisions of the Warren-Alquist Act, including the two sections challenged here, are invalid under the Supremacy Clause because they are pre-empted by the Atomic Energy Act. The District Court held that petitioners had standing to challenge §§ 25524.1(b) and 25524.2,[8] that the issues presented by these two statutes are ripe for adjudication, and that the two provisions are void because they are pre-empted by and in conflict with the Atomic Energy Act. 489 F. Supp. 699 (ED Cal. 1980).

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[7] After transmission of a Commission finding to the legislature, the certification of nuclear powerplants continues to be prohibited until 100 legislative days have elapsed without disaffirmance of the findings by either house of the legislature, or, if the findings have been disaffirmed but are then re-adhered to by the Energy Commission, if the legislature fails to void the renewed findings by statute within 100 legislative days after their retransmittal by the Commission.

[8] The District Court found that §§ 25524.1 and 25524.2, coupled with the Energy Commission's failure to make the required findings, made further investment by petitioners in nuclear plants "an unreasonable risk." The court also found that if those sections and other provisions were held invalid, petitioners would reactivate plans for further nuclear plant development. 489 F. Supp., at 700–701.

urt of Appeals for the Ninth Circuit affirmed the
'ourt's ruling that the petitioners have standing to
the California statutes, and also agreed that the
to § 25524.2 is ripe for review. It concluded, how-
the challenge to § 25524.1(b) was not ripe "[b]e-
cannot know whether the Energy Commission will
a nuclear plant's storage capacity to be inadequate
59 F. 2d 903, 918 (1981)." On the merits, the court
the nuclear moratorium provisions of § 25524.2
pre-empted because §§ 271 and 274(k) of the Atomic
Act, 42 U. S. C. §§ 2018 and 2021(k), constitute a
onal authorization for States to regulate nuclear
nts "for purposes other than protection against radi-
ards." The court held that § 25524.2 was not de-
provide protection against radiation hazards, but

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rt also held unripe challenges to various certification provi-
Pub. Res. Code Ann. §§ 25500, 25502, 25504, 25511, 25512,
6, 25517, 25519, 25520, 25523, 25532 (West 1977 and Supp.
rements that utilities acquire surrounding development rights,
st Supp. 1983), and the reprocessing provisions of § 25524.1(a).
ement that a utility propose at least three alternative sites,
s held ripe for review and not pre-empted by the Atomic En-
r reasons similar to those applied to § 25524.2. 659 F. 2d, at

271, 68 Stat. 960, as amended and as set forth in 42 U. S. C.
vides:
in this chapter shall be construed to affect the authority or
of any Federal, State or local agency with respect to the
sale, or transmission of electric power produced through the
ear facilities licensed by the Commission: *Provided*, That this
ll not be deemed to confer upon any Federal, State or local
authority to regulate, control, or restrict any activities of
ssion."
74(k), 73 Stat. 691, 42 U. S. C. § 2021(k), provides:
in this section shall be construed to affect the authority of any
al agency to regulate activities for purposes other than protec-
t radiation hazards."

these provisions in the federal regulatory structure is discussed
98–211.

was adopted because "uncertainties in the nuclear fuel cycle make nuclear power an uneconomical and uncertain source of energy." 659 F. 2d, at 925. Nor was the provision invalid as a barrier to fulfillment of the federal goal of encouraging the development of atomic energy. The granting of state authority in §§271 and 274(k), combined with recent federal enactments, demonstrated that Congress did not intend that nuclear power be developed "at all costs," but only that it proceed consistent with other priorities and subject to controls traditionally exercised by the States and expressly preserved by the federal statute.[12]

We granted certiorari limited to the questions of whether §§25524.1(b) and 25524.2 are ripe for judicial review, and whether they are pre-empted by the Atomic Energy Act. 457 U. S. 1132 (1982).

II

We agree that the challenge to §25524.2 *is* ripe for judicial review, but that the questions concerning §25524.1(b) are not. The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories* v. *Gardner*, 387

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[12] In the same appeal, the Ninth Circuit consolidated and decided a related challenge to §25524.2 brought by a nuclear engineer hired to work on a proposed nuclear plant who subsequently lost his job when the project was abandoned. The District Court had held that the engineer had standing to challenge the waste disposal law and that the law was pre-empted by the Atomic Energy Act. *Pacific Legal Foundation* v. *State Energy Resources Comm'n*, 472 F. Supp. 191 (SD Cal. 1979). The Court of Appeals disagreed with the District Court's standing analysis and reversed. 659 F. 2d, at 911–914. We denied certiorari. 457 U. S. 1133 (1982).

48–149 (1967). In *Abbott Laboratories*, which re-
leading discussion of the doctrine, we indicated
estion of ripeness turns on "the fitness of the is-
icial decision" and "the hardship to the parties of
court consideration." *Id.*, at 149.
hese factors counsel in favor of finding the chal-
waste disposal regulations in §25524.2 ripe for
. The question of pre-emption is predominantly
although it would be useful to have the benefit
a's interpretation of what constitutes a demon-
nology or means for the disposal of high-level
te, resolution of the pre-emption issue need not
development. Moreover, postponement of deci-
likely work substantial hardship on the utilities.
t of Appeals cogently reasoned, for the utilities to
hopes that, when the time for certification came,
equired findings would be made or the law would
own, requires the expenditures of millions of dol-
umber of years, without any certainty of recov-
ication were denied.[13] The construction of new
ities requires considerable advance planning—on
12 to 14 years.[14] Thus, as in the *Rail Reorga-*
t Cases, 419 U. S. 102, 144 (1974), "decisions to
w or in the short future may be affected" by
act. "'One does not have to await the consum-
reatened injury to obtain preventive relief. If
s certainly impending that is enough.'" *Id.*, at
Pennsylvania v. *West Virginia*, 262 U. S. 553,
To require the industry to proceed without
ether the moratorium is valid would impose a pal-

& Electric, for example, had spent at least $10 million be-
a notice of intention to file an application for certification.
F. Supp. 699 (ED Cal. 1980) (Finding of Fact No. 15, App.
t. 72).
Fact No. 13, *id.*, at 71.

pable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California. Moreover, if petitioners are correct that § 25524.2 is void because it hinders the commercial development of atomic energy, "delayed resolution would frustrate one of the key purposes of the [Atomic Energy] Act." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 82 (1978). For these reasons, the issue of whether § 25524.2 is preempted by federal law should be decided now.[15]

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[15] Respondents also contend that the waste disposal provision question is not ripe for review because even if the law is invalid, petitioners' injury—being prevented as a practical matter from building new nuclear powerplants—will not be fully redressed inasmuch as other sections of the Warren-Alquist Act, not before the Court, also prevent such construction. Respondents also suggest that this lack of redressability rises to the level of an Art. III concern. Both arguments are predicated entirely upon a statement in petitioners' reply brief in support of the petition for certiorari that "unless and until the California certification system statutes are reviewed and at least largely invalidated, petitioners will not again undertake to build nuclear power plants in California." Reply Brief for Petitioners 6. Respondents attempt to draw entirely too much from this statement. The California certification provisions do not impose a moratorium on new construction; in the main, they require that information be gathered on a variety of issues and be considered by the Energy Commission. Cal. Pub. Res. Code Ann. §§ 25500, 25502, 25504, 25511, 25512, 25514, 25516, 25517, 25519, 25520, 25523, 25532 (West 1977 and Supp. 1983). It is unreasonable to presume that these informational requirements will exert the same chilling effect on new construction as would a moratorium. The Ninth Circuit concurs:

> "[A] delay in adjudication will not cause any undue hardship for the parties. The certification scheme, in general, does not have an 'immediate and substantial impact' on the utilities. *Gardner* v. *Toilet Goods Association*, 387 U. S. 167, 171 . . . (1967); neither [Pacific Gas & Electric] nor [Southern California Edison] has a notice of intention or application for certification pending, and the threat that procedural burdens might someday be imposed or that certification might someday be denied for failure to meet Energy Commission standards is remote at best." 659 F. 2d, at 916 (footnote omitted).

Respondents' "fears" that petitioners will not seek to pursue the nuclear option, notwithstanding a favorable decision in this litigation, appear greatly exaggerated.

Questions concerning the constitutionality of the interim storage provision, § 25524.1(b), however, are not ripe for review. While the waste disposal statute operates on a statewide basis, the Energy Commission is directed to make determinations under § 25524.1(b) on a case-by-case basis. As the Court of Appeals explained, because "we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate," judicial consideration of this provision should await further developments.[16] Furthermore, because we hold today that § 25524.2 is not pre-empted by federal law, there is little likelihood that industry behavior would be uniquely affected by whatever uncertainty surrounds the interim storage provisions. In these circumstances, a court should not stretch to reach an early, and perhaps premature, decision respecting § 25524.1(b).

III

It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'" *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

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[16] The Court of Appeals noted that the draft report by the State Energy Commission's Nuclear Fuel Cycle Committee, which recommended requiring all nuclear plants to provide a specified amount of storage space, see Nuclear Fuel Cycle Committee, *supra* n. 4, at 113, does not necessarily render the provision ripe. The Committee report is only an indication of the views of two of five members of the Energy Commission in 1978. Not only may views change in the future, but the report itself cautions that it does not represent final agency action. Indeed, the full Commission's decision on January 25, 1978, did not adopt this report or the Committee's recommendations regarding on-site storage. Finally, the recently enacted Nuclear Waste Policy Act of 1982, Pub. L. 97–425, 96 Stat. 2201, 42 U. S. C. § 10101 *et seq.* (1982 ed.), authorizes the NRC to license technology for the on-site storage of spent fuel, § 133, and directs the Secretary of Energy to provide up to 1,900 metric tons of capacity for the storage of spent fuel, § 135; these provisions might influence the State Commission's ultimate findings.

Petitioners, the United States, and supporting *amici*, present three major lines of argument as to why § 25524.2 is pre-empted. First, they submit that the statute—because it regulates construction of nuclear plants and because it is allegedly predicated on safety concerns—ignores the division between federal and state authority created by the Atomic Energy Act, and falls within the field that the Federal Government has preserved for its own exclusive control. Second, the statute, and the judgments that underlie it, conflict with decisions concerning the nuclear waste disposal issue made by Congress and the Nuclear Regulatory Commission. Third, the California statute frustrates the federal goal of developing nuclear technology as a source of energy. We consider each of these contentions in turn.

A

Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensiveness, it does not at any point expressly require the States to construct or authorize nuclear powerplants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors. Instead, petitioners argue that the Act is intended to preserve the Federal Government as the sole regulator of all matters nuclear, and that §25524.2 falls within the scope of this impliedly pre-empted field. But as we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States. Justice Brandeis once observed that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." *Frost* v. *Corporation Comm'n*, 278 U. S. 515, 534 (1929) (dissenting opinion). "The nature of government regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 569 (1980) ("The State's concern that rates be fair and efficient represents a clear and substantial governmental interest"). With the exception of the broad authority of the

Federal Power Commission, now the Federal Energy Regulatory Commission, over the need for and pricing of electrical power transmitted in interstate commerce, see Federal Power Act, 16 U. S. C. §824 (1976 ed. and Supp. V), these economic aspects of electrical generation have been regulated for many years and in great detail by the States.[17] As we noted in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 550 (1978): "There is little doubt that under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power." Thus, "Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp., supra*, at 230.

The Atomic Energy Act must be read, however, against another background. Enrico Fermi demonstrated the first nuclear reactor in 1942, and Congress authorized civilian application of atomic power in 1946, Atomic Energy Act of 1946, see Act of Aug. 1, 1946, 60 Stat. 755, at which time the Atomic Energy Commission (AEC) was created. Until 1954, however, the use, control, and ownership of nuclear technology remained a federal monopoly. The Atomic Energy Act of 1954, Act of Aug. 30, 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.* (1976 ed. and Supp. V), grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H. R. Rep. No. 2181, 83d Cong., 2d Sess., 1–11 (1954). The Act implemented this policy decision by providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 63. The AEC, however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. 42 U. S. C. §§ 2014(e), (z), (aa), 2061–2064, 2071–2078, 2091–2099, 2111–2114 (1976 ed. and Supp. V). Upon these subjects, no role was left for the States.

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[17] As early as 1920, many States had adopted legislation empowering utility commissions to regulate electric utilities. See Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920, 79 Colum. L. Rev. 426, 454–455 (1979). Today, every State has a regulatory body with authority for assuring adequate electric service at reasonable rates. House Committee on Interstate and Foreign Commerce, The Electric Utility Sector: Concepts, Practices, and Problems, 95th Cong., 1st Sess., 12 (Comm. Print 1977). For a description of the regulatory framework in effect in the States, see American Bar Association, Special Committee on Energy Law, The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities (1981).

The Commission, however, was not given authority over the generation of electricity itself, or over the economic question whether a particular plant should be built. We observed in *Vermont Yankee, supra*, at 550, that "[t]he Commission's prime area of concern in the licensing context, . . . is national security, public health, and safety." See also *Power Reactor Development Co.* v. *Electrical Workers*, 367 U. S. 396, 415 (1961) (utility's investment not to be considered by Commission in its licensing decisions). The Nuclear Regulatory Commission (NRC), which now exercises the AEC's regulatory authority, does not purport to exercise its authority based on economic considerations, 10 CFR § 8.4 (1982), and has recently repealed its regulations concerning the financial qualifications and capabilities of a utility proposing to construct and operate a nuclear powerplant. 47 Fed. Reg. 13751 (1982). In its notice of rule repeal, the NRC stated that utility financial qualifications are only of concern to the NRC if related to the public health and safety.[18] It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments. Any doubt that ratemaking and plant-need questions were to remain in state hands was removed by § 271, 42 U. S. C. § 2018, which provided:

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[18] See also NRC Atomic Safety and Licensing Appeal Board, *Consolidated Edison Co. of N. Y., Inc.*, 7 N. R. C. 31, 34 (1978): "States . . . re-

> "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission . . . ."

The legislative Reports accompanying this provision do little more than restate the statutory language, S. Rep. No. 1699, 83d Cong., 2d Sess., 31 (1954); H. R. Rep. No. 2181, *supra*, at 31, but statements on the floor of Congress confirm that while the safety of nuclear technology was the exclusive business of the Federal Government, state power over the production of electricity was not otherwise displaced.[19]

The 1959 amendments reinforced this fundamental division of authority. In 1959, Congress amended the Atomic Energy Act in order to "clarify the respective responsibilities

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tain the right, even in the face of the issuance of an NRC construction permit, to preclude construction on such bases as a lack of need for additional generating capacity or the environmental unacceptability of the proposed facility or site."

[19] 100 Cong. Rec. 12015, 12197–12202 (1954) (remarks of Sen. Hickenlooper); *id.*, at 10559 (statements of AEC Chairman Strauss). Particularly instructive is an exchange on the House floor between Representatives Yates and Cole. Representative Yates inquired if the bill imposed the duty upon the Commission "to determine whether the public convenience and necessity require certain commercial institutions to be licensed to construct reactors for the production of power for civilian purposes?" Representative Cole responded that there was no such imposition to grant licenses based upon public convenience and necessity. "That," he said, "is regulated by existing Federal and State authorities. We do not touch that in any respect." *Id.*, at 11689.

. . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials." 42 U. S. C. § 2021(a)(1). See S. Rep. No. 870, 86th Cong., 1st Sess., 8, 10–12 (1959). The authority of the States over the planning for new powerplants and ratemaking were not at issue. Indeed, the point of the 1959 Amendments was to heighten the States' role. Section 274(b), 42 U. S. C. § 2021(b), authorized the NRC, by agreements with state governors to discontinue its regulatory authority over certain nuclear materials under limited conditions.[20] State programs permitted under the amendment were required to be "coordinated and compatible" with that of the NRC. § 2021(g); S. Rep. No. 870, *supra*, at 11. The subject matters of those agreements were also limited by § 274(c), 42 U. S. C. § 2021(c), which states:

> "[T]he Commission shall retain authority and responsibility with respect to regulation of—
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> "(1) the construction and operation of any production or utilization facility;
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> . . . . .
>
> "(4) the disposal of such . . . byproduct, source, or special nuclear material as the Commission determines . . . should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission."

Although the authority reserved by § 274(c) was exclusively for the Commission to exercise, see S. Rep. No. 870, *supra*, at 8, 9; H. R. Rep. No. 1125, 86th Cong., 1st Sess., 8, 9 (1959), Congress made clear that the section was not intended to cut back on pre-existing state authority outside the

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[20] Authority could be shifted to the States for control over byproduct and source material, and over special nuclear material "in quantities not sufficient to form a critical mass." California has signed a § 274 agreement. Cal. Health & Safety Code Ann. §§ 25875–25876 (West 1967).

NRC's jurisdiction.[21] Section 274(k), 42 U. S. C. § 2021(k), states:

> "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

Section 274(k), by itself, limits only the pre-emptive effect of "this section," that is, § 274, and does not represent an affirmative grant of power to the States. But Congress, by permitting regulation "for purposes other than protection against radiation hazards" underscored the distinction drawn in 1954 between the spheres of activity left respectively to the Federal Government and the States.

This regulatory structure has remained unchanged, for our purposes, until 1965, when the following proviso was added to § 271:

> "*Provided*, that this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the Commission."

The accompanying Report by the Joint Committee on Atomic Energy makes clear that the amendment was not intended to detract from state authority over energy facilities.[22] Instead, the proviso was added to overrule a Court of Appeals opinion which interpreted § 271 to allow a municipality to prohibit transmission lines necessary for the AEC's own activities. *Maun* v. *United States*, 347 F. 2d 970 (CA9 1965). There is no indication that Congress intended any broader limitation of state regulatory power over utility companies. Indeed, Reports and debates accompanying the 1965 amendment indicate that § 271's purpose "was to make it absolutely clear that the Atomic Energy Act's special provisions on licensing of reactors did not disturb the status quo with respect to the then existing authority of Federal, State, and local bodies to regulate generation, sale, or transmission of electric power." 111 Cong. Rec. 19822 (1965) (statement of Sen. Hickenlooper).[23]

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[21] In addition to § 274(k), § 274(*l*), 42 U. S. C. § 2021(*l*), created an advisory role for the States respecting activities exclusively within the NRC's jurisdiction, and § 274(g), 21 U. S. C. § 2021(g), directs the Commission to cooperate with the States even in the formulation of standards for regulation against radiation hazards.

[22] "Because of these unique provisions in the act pertaining to AEC's licensing and regulation of persons operating reactors which could be used to produce electricity, there was some feeling of uneasiness among the drafters of the legislation over the effect of the new law upon other agencies—Federal, State, and local—having jurisdiction over the generation, sale, and transmission of electric power. It was recognized by the drafters that the authority of these other agencies with respect to the generation, sale, and transmission of electric power produced through the use of nuclear facilities was not affected by this new law; and that the AEC's regulatory

This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of

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control was limited to considerations involving the common defense and security and the protection of the health and safety of the public with respect to the special hazards associated with the operation of nuclear facilities. Nevertheless, section 271 was added to make it explicit that licensees of the AEC who produced power though the use of nuclear facilities would otherwise remain subject to the authority of all appropriate Federal, State, and local authorities with respect to the generation, sale, or transmission of electric power." H. R. Rep. No. 567, 89th Cong., 1st Sess., 4 (1965).

"The amendment of this section effected by this bill is intended as a clarification of the meaning of section 271 as originally enacted." *Id.*, at 10.

[23] While expressions of a subsequent Congress generally are not thought particularly useful in ascertaining the intent of an earlier Congress, Senator Hickenlooper, the sponsor of the 1965 amendment, was an important figure in the drafting of the 1954 Act. Senator Pastore, also involved in the writing of the 1954 Act, elaborated:

"We were conscious that it was not desired that the AEC should engage in the business of regulating electricity as such. . . . We were trying to keep the AEC out of the business of regulating electricity. That is what gave birth to section 271. We provided that nothing in the act would affect the local supervising authority's right to control the manufacture of electricity generated by nuclear facilities." 111 Cong. Rec. 19832 (1965).

nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.[24]

The above is not particularly controversial. But deciding how § 25524.2 is to be construed and classified is a more difficult proposition. At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of nonsafety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation. Respondents appear to concede as much. Respondents do broadly argue, however, that although safety regulation of nuclear plants by States is forbidden, a State may completely prohibit new construction until its safety concerns are satisfied by the Federal Government. We reject this line of reasoning. State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.[25] When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 236. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC, see, *infra*, at 218–219, that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal. A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use—and would be pre-empted for that reason. *Infra*, at 221–222.

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[24] Our summary affirmance in *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (CA8 1971), summarily aff'd, 405 U. S. 1035 (1972), is fully consistent with this reading of the division of regulatory authority. Minnesota's effort to regulate radioactive waste discharges from nuclear plants fell squarely within the field of safety regulation reserved for federal regulation. The invalidation of this regulation in *Northern States* requires no retraction of the state authority preserved in §§ 271 and 274 of the Act. And, as with all summary affirmances, our action "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel* v. *Williams*, 457 U. S. 55, 64, n. 13 (1982); *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) *(per curiam)*.

[25] In addition to the opportunity to enter into agreements with the NRC under § 274(c), Congress has specifically authorized the States to regulate

That being the case, it is necessary to determine whether there is a nonsafety rationale for § 25524.2. California has maintained, and the Court of Appeals agreed, that § 25524.2 was aimed at economic problems, not radiation hazards. The California Assembly Committee on Resources, Land Use, and Energy, which proposed a package of bills including § 25524.2, reported that the waste disposal problem was "largely economic or the result of poor planning, *not* safety related." Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and its Alternatives, p. 18 (1976) (Reassessment Report) (emphasis in original). The Committee explained that the lack of a federally approved method of waste disposal created a "clog" in the nuclear fuel cycle. Storage space was limited while more nuclear wastes were continuously produced. Without a permanent means of disposal, the nuclear waste problem could become critical,

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radioactive air pollutants from nuclear plants, Clean Air Act Amendments of 1977, § 122, 42 U. S. C. § 7422 (1976 ed., Supp. V), and to impose certain siting and land-use requirements for nuclear plants, NRC Authorization Act for Fiscal Year 1980, Pub. L. 96–295, 94 Stat. 780.

leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors. "Waste disposal *safety*," the Reassessment Report notes, "is not directly addressed by the bills, which ask only that a method [of waste disposal] be chosen and accepted by the federal government." *Id.*, at 156 (emphasis in original).

The Court of Appeals adopted this reading of § 25524.2. Relying on the Reassessment Report, the court concluded:

> "[S]ection 25524.2 is directed towards purposes other than protection against radiation hazards. While Proposition 15 would have required California to judge the safety of a proposed method of waste disposal, section 25524.2 leaves that judgment to the federal government. California is concerned not with the adequacy of the method, but rather with its existence." 659 F. 2d, at 925.

Our general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals. Cf. *Mills* v. *Rogers*, 457 U. S. 291, 306 (1982); *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976). Petitioners and *amici* nevertheless attempt to upset this interpretation in a number of ways. First, they maintain that § 25524.2 evinces no concern with the economics of nuclear power. The statute states that the "development" and "existence" of a permanent disposal technology approved by federal authorities will lift the moratorium; the statute does not provide for considering the economic costs of the technology selected. This view of the statute is overly myopic. Once a technology is selected and demonstrated, the utilities and the California Public Utilities Commission would be able to estimate costs; such cost estimates cannot be made until the Federal Government has settled upon the method of long-term waste disposal. Moreover, once a satisfactory disposal technology is found and demonstrated, fears of having to close down operating reactors should largely evaporate.

Second, it is suggested that California, if concerned with economics, would have banned California utilities from building plants outside the State. This objection carries little force. There is no indication that California utilities are contemplating such construction; the state legislature is not obligated to address purely hypothetical facets of a problem.

Third, petitioners note that there already is a body, the California Public Utilities Commission, which is authorized to determine on economic grounds whether a nuclear powerplant should be constructed.[26] While California is certainly free to make these decisions on a case-by-case basis, a State is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases. The economic uncertainties engendered by the nuclear waste disposal problems are not factors that vary from facility to facility; the issue readily lends itself to more generalized decisionmaking and California cannot be faulted for pursuing that course.

Fourth, petitioners note that Proposition 15, the initiative out of which §25524.2 arose, and companion provisions in California's so-called nuclear laws, are more clearly written with safety purposes in mind.[27] It is suggested that §25524.2 shares a common heritage with these laws and should be presumed to have been enacted for the same purposes. The short answer here is that these other state laws are not before the Court, and indeed, Proposition 15 was not passed; these provisions and their pedigree do not taint other parts of the Warren-Alquist Act.

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[26] Cal. Pub. Util. Code Ann. § 1001 (West 1975 and Supp. 1983).

[27] The 1976 amendments to the Warren-Alquist Act were passed as an alternative to Proposition 15, an initiative submitted to California's voters in June 1976. (By their terms, these provisions would not have become operative if Proposition 15 had been adopted. Cal. Pub. Res. Code Ann. §25524.2, Historical Note (West 1977). The proposition was rejected.) Like §25524.2, Proposition 15, among other things, barred the construction of new nuclear powerplants unless a permanent method of waste disposal was developed, though Proposition 15 gave as the reason for its concern the threat of harm to "the land or the people of . . . California." Similarly, Cal. Pub. Res. Code Ann. §25524.3(b) (West Supp. 1982) requires the State Energy Commission to undertake a study of underground placement and berm containment of nuclear reactors, to determine whether such construction techniques are necessary for "enhancing the public health and safety . . . ."

Although these specific indicia of California's intent in enacting §25524.2 are subject to varying interpretation, there are two further reasons why we should not become embroiled in attempting to ascertain California's true motive. First, inquiry into legislative motive is often an unsatisfactory venture. *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968). What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it. Second, it would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings. In these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands.

Therefore, we accept California's avowed economic purpose as the rationale for enacting §25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation.[28]

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[28] Petitioners correctly cite *Perez* v. *Campbell*, 402 U. S. 637, 651 (1971), for the proposition that state law may not frustrate the operation of federal law simply because the state legislature in passing its law had some purpose in mind other than one of frustration. In *Perez*, however, unlike this case, there was an actual conflict between state and federal law. *Perez* involved an Arizona law that required uninsured motorists who had not satisfied judgments against them or had failed to pay settlements after accidents to prove their financial responsibility before the State would license them to drive again. The Arizona law, contrary to the Federal Bankruptcy Act, specified that this obligation would not be discharged in bankruptcy. We held the state law pre-empted, despite the fact that its purpose was to deter irresponsible driving rather than to aid in the collection

B

Petitioners' second major argument concerns federal regulation aimed at the nuclear waste disposal problem itself. It is contended that § 25524.2 conflicts with federal regulation of nuclear waste disposal, with the NRC's decision that it is permissible to continue to license reactors, notwithstanding uncertainty surrounding the waste disposal problem, and with Congress' recent passage of legislation directed at that problem.

Pursuant to its authority under the Act, 42 U. S. C. §§ 2071–2075, 2111–2114 (1976 ed. and Supp. V), the AEC, and later the NRC, promulgated extensive and detailed regulations concerning the operation of nuclear facilities and the handling of nuclear materials. The following provisions are relevant to the spent fuel and waste disposal issues in this case. To receive an NRC operating license, one must submit a safety analysis report, which includes a "radioactive waste handling syste[m]." 10 CFR § 50.34(b)(2)(i), (ii) (1982). See also 10 CFR § 150.15(a)(1)(i) (1982). The regulations specify general design criteria and control requirements for fuel storage and handling and radioactive waste to be stored at the reactor site. 10 CFR pt. 50, App. A, Criteria 60–64, p. 412 (1982). In addition, the NRC has promulgated detailed regulations governing storage and disposal away from the reactor. 10 CFR pt. 72 (1982). NRC has also promulgated procedural requirements covering license applications for disposal of high-level radioactive waste in geologic repositories. 10 CFR pt. 60 (1982).

Congress gave the Department of Energy the responsibility for "the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes." 42 U. S. C. § 7133(a)(8)(C) (1976 ed.,

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of debts. Only if there were an actual conflict between § 25524.2 and the Atomic Energy Act, such that adherence to both were impossible or the operation of state law frustrated accomplishment of the federal objective, would *Perez* be apposite.

Supp. V). No such permanent disposal facilities have yet been licensed, and the NRC and the Department of Energy continue to authorize the storage of spent fuel at reactor sites in pools of water. In 1977, the NRC was asked by the Natural Resources Defense Council to halt reactor licensing until it had determined that there was a method of permanent disposal for high-level waste. The NRC concluded that, given the progress toward the development of disposal facilities and the availability of interim storage, it could continue to license new reactors. *Natural Resources Defense Council, Inc.* v. *NRC*, 582 F. 2d 166, 168–169 (CA2 1978).

The NRC's imprimatur, however, indicates only that it is safe to proceed with such plants, not that it is economically wise to do so.[29] Because the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and § 25524.2 is possible. Moreover, because the NRC's regulations are aimed at insuring that plants are safe, not necessarily that they are economical, § 25524.2 does not interfere with the objective of the federal regulation.

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[29] The Natural Resources Defense Council's petition with the NRC claimed that the Atomic Energy Act required the agency to consider the safety aspects of off-site waste disposal in determining whether to license reactors. The NRC denied the petition, stating that it had to examine only on-site safety risks in its licensing decisions. 42 Fed. Reg. 34391 (1977). The NRC was *not* asked to consider whether nuclear reactors were sufficiently reliable investments in light of the unresolved waste disposal question, and the NRC did not address this issue. Nor was the issue raised in the review of the NRC's decision in *Natural Resources Defense Council, Inc.* v. *NRC*, 582 F. 2d 166 (CA2 1978). As the Court of Appeals stated, "the issue . . . is whether NRC, prior to granting nuclear power reactor operating licenses, is required by the public health and safety requirement of the [Atomic Energy Act] to make a determination . . . that high-level radioactive wastes can be permanently disposed of safely." *Id.*, at 170 (emphasis deleted).

Similarly, the NRC's proceeding addressing the extent to which assessments of waste disposal technology should be factored into NRC reactor licensing does not address the economic ramifications of the issue. This matter has been the subject of prolonged litigation, and is presently pending before the Court. See *Natural Resources Defense Council, Inc.* v. *NRC*, 178 U. S. App. D. C. 336, 547 F. 2d 633 (1976), rev'd *sub nom. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), on remand, 222 U. S. App. D. C. 9, 685 F. 2d 459 (1982), cert. granted *sub nom. Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 459 U. S. 1034 (1982).

Nor has California sought through § 25524.2 to impose its own standards on nuclear waste disposal. The statute accepts that it is the federal responsibility to develop and license such technology. As there is no attempt on California's part to enter this field, one which is occupied by the Federal Government, we do not find § 25524.2 pre-empted any more by the NRC's obligations in the waste disposal field than by its licensing power over the plants themselves.

After this case was decided by the Court of Appeals, a new piece was added to the regulatory puzzle. In its closing week, the 97th Congress passed the Nuclear Waste Policy Act of 1982, Pub. L. 97–425, 96 Stat. 2201, a complex bill providing for a multifaceted attack on the problem. *Inter alia*, the bill authorizes repositories for disposal of high-level radioactive waste and spent nuclear fuel, provides for licensing and expansion of interim storage, authorizes research and development, and provides a scheme for financing. While the passage of this new legislation may convince state authorities that there is now a sufficient federal commitment to fuel storage and waste disposal that licensing of nuclear reactors may resume, and, indeed, this seems to be one of the purposes of the Act,[30] it does not appear that Congress in-

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[30] The Act itself, § 111(b), 42 U. S. C. § 10131(b) (1982 ed.), enumerates the following purposes:

"(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and . . . spent nuclear fuel . . . ;

"(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel." 96 Stat. 2207.

See also H. R. Rep. No. 97–785, pt. 2, pp. 59–60 (1982) (purpose of Act to provide "reasonable assurance that safe waste disposal methods will be tended to make that decision for the States through this legislation. Senator McClure attempted to do precisely that with an amendment to the Senate bill providing that the Act satisfied any legal requirements for the existence of an approved technology and facilities for disposal of spent fuel and high-level nuclear waste. The amendment was adopted by the Senate without debate. 128 Cong. Rec. S4310 (Apr. 29, 1982). During subsequent House hearings, it was strongly urged that this language be omitted so as not to affect this case. See Nuclear Waste Disposal Policy, Hearings before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce, 97th Cong., 2d Sess., 356, 406, 553–554 (1982). The bill which emerged from the House Committee did omit the Senate language, and its manager, Representative Ottinger, stated to the House that the language was deleted "to insure that there be no preemption." 128 Cong. Rec. H8797 (Dec. 2, 1982). The bill ultimately signed into law followed the House language. While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected. Moreover, it is certainly possible to interpret the Act as directed at solving the nuclear waste disposal problem for existing reactors without necessarily encouraging or requiring that future plant construction be undertaken.

C

Finally, it is strongly contended that § 25524.2 frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power. It is well established that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-

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available when needed"); 128 Cong. Rec. H8162 (Sept. 30, 1982) (remarks of Rep. Udall); *id.*, at H8166 (Sept. 30, 1982) (remarks of Rep. Winn) (the Act "demonstrates to the public and industry that the Federal Government is fulfilling its reponsibility to dispose of high-level waste").

gress." *Hines* v. *Davidowitz*, 312 U. S., at 67; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142–143; *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S., at 153.

There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. The Act itself states that it is a program "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U. S. C. § 2013(d). The House and Senate Reports confirmed that it was "a major policy goal of the United States" that the involvement of private industry would "speed the further development of the peaceful uses of atomic energy." H. R. Rep. No. 883, 89th Cong., 1st Sess., 4 (1965); H. R. Rep. No. 2181, 83d Cong., 2d Sess., 9 (1954); S. Rep. No. 1699, 83d Cong., 2d Sess., 9 (1954). The same purpose is manifest in the passage of the Price-Anderson Act, 42 U. S. C. § 2210, which limits private liability from a nuclear accident. The Act was passed "[i]n order to protect the public and to encourage the development of the atomic energy industry . . . ." 42 U. S. C. § 2012(i). *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 63–67.

The Court of Appeals' suggestion that legislation since 1974 has indicated a "change in congressional outlook" is unconvincing. The court observed that Congress reorganized the Atomic Energy Commission in 1974 by dividing the promotional and safety responsibilities of the AEC, giving the former to the Energy Research and Development Administration (ERDA)[31] and the latter to the NRC. Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq.* The evident desire of Congress to prevent safety from being compromised by promotional concerns does not translate into an abandonment of the objective of promoting nuclear power. The legislation was carefully drafted, in fact, to avoid any antinuclear sentiment.[32] The continuing commitment to nuclear power is reflected in the extension of the Price-Anderson Act's coverage until 1987, Pub. L. 94–197, §2–14, 89 Stat. 1111–1115, as well as in Congress' express preclusion of reliance on natural gas and petroleum as primary energy sources in new powerplants, Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3291, 42 U. S. C. §§8301(b)(3), 8311, 8312(a) (1976 ed., Supp. V). It is true, of course, that Congress has sought to simultaneously promote the development of alternative energy sources, but we do not view these steps as an indication that Congress has retreated from its oft-expressed commitment to further development of nuclear power for electricity generation.

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[31] In 1977, ERDA's functions were transferred to the Department of Energy. 91 Stat. 577, 42 U. S. C. § 7151(a) (1976 ed., Supp. V).

The Court of Appeals is right, however, that the promotion of nuclear power is not to be accomplished "at all costs." The elaborate licensing and safety provisions and the continued preservation of state regulation in traditional areas belie that. Moreover, Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-à-vis a fossil fuel plant should be built. The decision of California to exercise that authority does not, in itself, constitute a basis for pre-emption.[33] Therefore, while the argument of petitioners and the United States has considerable force, the legal reality remains that Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.[34]

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[32] The Senate bill had included language prohibiting the ERDA from "giving unwarranted priority to any single energy source" out of concern that the ERDA "may give an unwarranted priority to development of nuclear power to the detriment of competing energy technologies." S. Rep. No. 93–980, p. 27 (1974). The House bill expressed no concern about giving "unwarranted priority" to nuclear power. H. R. Rep. No. 93–707 (1973). The bill reported by the Conference Committee, and subsequently enacted, did not contain the Senate's prohibitory language, but instead stated that all technologies were to be promoted. H. R. Conf. Rep. No. 93–1445, p. 25 (1974).

[33] We recently rejected a similar claim that congressional policy to favor the use of coal as a fuel source pre-empted state legislation that may have

IV

The judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except to the extent it suggests that a State may not prohibit the construction of nuclear powerplants if the State is motivated by concerns about the safety of such plants. Since the Court finds that California was not so motivated, this suggestion is unnecessary to the

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an adverse effect on the use of coal. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 633 (1981).

[34] Our resolution of this case is not controlled by *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152 (1946). In *First Iowa*, this Court held that compliance with requirements for a state permit under Iowa law was not necessary in order to secure a federal license for a hydroelectric project. Allowing the States to veto federal decisions could "destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of [the Federal Government]." *Id.*, at 164. In the same manner, requiring compliance with state requirements would have reduced the project to a size that the Federal Power Commission had determined was inadequate, and compliance with state engineering requirements could handicap the financial success of the project. The Atomic Energy Act does not give the NRC comprehensive planning responsibility. Moreover, § 25524.2 does not interfere with the type of plant that could be constructed. State regulations which affected the construction and operation of federally approved nuclear powerplants would pose a different case.

Court's holding. More important, I believe the Court's dictum is wrong in several respects.

The Court takes the position that a State's safety-motivated decision to prohibit construction of nuclear powerplants would be pre-empted for three distinct reasons. First, the Court states that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Ante*, at 212. Second, the Court indicates that "a state judgment that nuclear power is not safe enough to be further developed would conflict squarely with the countervailing judgment of the NRC . . . that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal." *Ante*, at 213. Third, the Court believes that a prohibition on construction of new nuclear plants would "be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use." *Ibid.* For reasons summarized below, I cannot agree that a State's nuclear moratorium, even if motivated by safety concerns, would be pre-empted on any of these grounds.

I

First, Congress has occupied not the broad field of "nuclear safety concerns," but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards.[1] States traditionally have possessed the authority to choose which technologies to rely on in meeting their energy needs. Nothing in the Atomic Energy Act limits this authority, or intimates that a State, in exercising this authority, may not consider the features that distinguish nuclear plants from other power sources. On the contrary, § 271 of the Act, 68 Stat. 960, as amended, 42 U. S. C. § 2018, indicates that States may continue, with respect to nuclear power, to exercise their traditional police power over the manner in which they meet their energy needs. There is, in short, no evidence that Congress had a "clear and manifest purpose," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), to force States to be blind to whatever special dangers are posed by nuclear plants.

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[1] The Court recognizes the limited nature of the federal role, *ante*, at 205, but then describes that role in more expansive terms, *ante*, at 212–213.

Federal pre-emption of the States' authority to decide against nuclear power would create a regulatory vacuum. See Wiggins, Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study, 13 U. C. D. L. Rev. 3, 64 (1979). In making its traditional policy choices about what kinds of power are best suited to its needs, a State would be forced to ignore the undeniable fact that nuclear power entails certain risks. While the NRC does evaluate the dangers of generating nuclear power, it does not balance those dangers against the risks, costs, and benefits of other choices available to the State or consider the State's standards of public convenience and necessity. As Professor Wiggins noted:

> "If a state utility regulatory agency like California's Energy Commission is prevented from making a general evaluation of feasibility, on broad grounds of social, economic and ideological policy, then the decision *whether* to build a nuclear facility in a state will ultimately be made only by the public utility seeking its construction. . . . It would be ironic if public energy utilities, granted a jurisdictional monopoly in large part because of their heavy regulation by the state, were freed from regulatory oversight of the one decision which promises to affect the greatest number of persons over the greatest possible time." *Ibid.* (emphasis in original).

In short, there is an important distinction between the threshold determination whether to permit the construction of new nuclear plants and, if the decision is to permit construction, the subsequent determinations of how to construct and operate those plants. The threshold decision belongs to the State; the latter decisions are for the NRC. See Note, May A State Say "No" to Nuclear Power? *Pacific Legal Foundation* Gives a Disappointing Answer, 10 Envir. L. 189, 199 (1979) (criticizing District Court decision in the present case).

II

The Court's second basis for suggesting that States may not prohibit the construction of nuclear plants on safety grounds is that such a prohibition would conflict with the NRC's judgment that construction of nuclear plants may safely proceed. A flat ban for safety reasons, however, would not make "compliance with both federal and state regulations . . . a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963). The NRC has expressed its judgment that it is safe to proceed with construction and operation of nuclear plants, but neither the NRC nor Congress has mandated that States do so.[2] See *ante*, at 205.

III

A state regulation also conflicts with federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). The Court suggests that a safety-motivated state ban on nuclear plants would be pre-empted under this standard as well. See *ante*, at 213, 221–222.[3] But Congress has merely encouraged the development of nuclear technology so as to make another source of energy available to the States; Congress has not forced the States to accept this particular source. See Note, 10 Envir. L., at 199 ("Congress has not evidenced a dictatorial intent for every state to build nuclear powerplants"). A ban on nuclear plant construction for safety reasons thus does not conflict with Congress' objectives or purposes.

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[2] A conflict would exist, of course, if the NRC determined that construction of nuclear plants could not proceed and a State nevertheless chose to go ahead with construction. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 143.

[3] The Court states that such a ban would be "in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use." *Ante*, at 213. A State's decision not to permit construction of nuclear plants, however, affects only indirectly the Atomic Energy Act's goal of ensuring that nuclear power be safe enough

The Atomic Energy Act was intended to promote the technological development of nuclear power, at a time when there was no private nuclear power industry. The Act addressed "the practical question of bringing such an industry into being,"[3] in order to make available an additional energy source. The Court makes much of the general statements of purpose in the Act and the legislative history, see *ante*, at 221, but those statements simply reflect Congress' desire to create a private nuclear power industry. Congress did not compel States to give preference to the eventual product of that industry or to ignore the peculiar problems associated with that product. See Wiggins, 13 U. C. D. L. Rev., at 78.

More recent legislation makes it very clear that there is no federal policy preventing a State from choosing to rely on technologies it considers safer than nuclear power. The Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U. S. C.

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for widespread development. A safety-motivated ban might highlight a State's perception that the federal safety goal had not been accomplished, but the ban itself would not interfere with efforts to achieve that goal.

The Court apparently believes the Atomic Energy Act's actual purpose was to maximize the use of nuclear power to satisfy the Nation's needs. A moratorium on construction of nuclear plants would prevent the accomplishment of this goal, but, as demonstrated *infra*, the Court is incorrect in attributing this goal to Congress. Moreover, the degree to which a nuclear moratorium hampers achievement of the goal does not depend on the motives of its framers.

[3] Address by Congressman Cole, Chairman of Joint Committee on Atomic Energy, delivered at International Congress on Nuclear Engineering (June 24, 1954), quoted in Lemov, State and Local Control Over the Location of Nuclear Reactors Under the Atomic Energy Act of 1954, 39 N. Y. U. L. Rev. 1008, 1018 (1964).

§ 5801 *et seq.* (1976 ed. and Supp. V), separated promotional and regulatory functions in the area of nuclear power. The Act established the NRC to perform the regulatory and licensing functions of the Atomic Energy Commission, § 5841, and the Energy Research and Development Administration (ERDA) to "develop, and increase the efficiency and reliability of use of, all energy sources." § 5801(a).[5] The legislative history of the Act expresses concern about a pronuclear bias in the regulatory agency and demonstrates a desire to have the Federal Government "place greater relative emphasis on nonnuclear energy." S. Rep. No. 93–980, p. 14 (1974).[6]

This legislative purpose is consistent with the fact that States retain many means of prohibiting the construction of nuclear plants within their borders. States may refuse to issue certificates of public convenience and necessity for individual nuclear powerplants. They may establish siting and land use requirements for nuclear plants that are more stringent than those of the NRC. Cf. NRC Authorization Act for Fiscal 1980, Pub. L. 96–295, § 108(f), 94 Stat. 783. Under the Clean Air Act Amendments of 1977, States may regulate radioactive air emissions from nuclear plants and may impose more stringent emission standards than those promulgated by the NRC. 42 U. S. C. §§ 7416, 7422 (1976 ed., Supp. V). This authority may be used to prevent the construction of nuclear plants altogether. *Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2)*, ALAB–453, 7 N. R. C. 31, 34, and n. 13 (1978).

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[5] In 1977, ERDA's functions were transferred to the Department of Energy. 91 Stat. 577, 42 U. S. C. § 7151(a) (1976 ed., Supp. V).

[6] In subsequent legislation Congress has continued to promote many sources of energy, without giving preference to nuclear power. See, *e. g.*, Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3291, 42 U. S. C. § 8301 *et seq.* (1976 ed., Supp. V) (encouraging greater use of coal and other alternative fuels in lieu of natural gas and petroleum); Public Utility Regulatory Policies Act of 1978, § 210, 92 Stat. 3144, 16 U. S. C. § 824a–3 (1976 ed., Supp. V) (encouraging development of cogeneration and small power production facilities).

In sum, Congress has not required States to "go nuclear," in whole or in part. The Atomic Energy Act's twin goals were to promote the development of a technology and to ensure the safety of that technology. Although that Act reserves to the NRC decisions about how to build and operate nuclear plants, the Court reads too much into the Act in suggesting that it also limits the States' traditional power to decide what types of electric power to utilize. Congress simply has made the nuclear option available, and a State may decline that option for any reason. Rather than rest on the elusive test of legislative motive, therefore, I would conclude that the decision whether to build nuclear plants remains with the States. In my view, a ban on construction of nuclear powerplants would be valid even if its authors were motivated by fear of a core meltdown or other nuclear catastrophe.

ALABAMA *v.* EVANS

ON APPLICATION TO VACATE STAY OF EXECUTION

No. A-858. Decided April 22, 1983

After the Circuit Justice had denied respondent's application for a stay of execution of his death sentence, he filed a petition for a writ of habeas corpus in Federal District Court, which temporarily stayed the execution. The Court of Appeals denied the State's motion to vacate the stay, and the State then filed with the Circuit Justice the instant application to vacate the District Court's stay. The application was referred to the Court.

Held: The application to vacate the District Court's stay is granted. Respondent's constitutional challenges to Alabama's capital-sentencing procedures were reviewed exhaustively by several state and federal courts. There is no merit to respondent's new challenge that the trial court construed in an unconstitutionally broad manner the statutory aggravating factor of his having knowingly created a great risk of death to many persons. On the facts, there was no violation of the principle established in *Godfrey* v. *Georgia*, 446 U. S. 420, that aggravating factors must be construed and applied in a nonarbitrary manner. Nor is there any question that application of the aggravating factor involved here was proper under the Alabama statute as construed by the Alabama courts.

Application to vacate stay granted.

PER CURIAM.

This matter was presented to JUSTICE POWELL on the morning of April 22, 1983, on an application for an order vacating a stay of execution, and by him referred to the Court. It is helpful to review briefly the sequence of events that preceded this application.

On April 8, 1983, the Alabama Supreme Court ordered that respondent John Louis Evans III be executed on April 22, 1983, at 12:01 a. m., c. s. t. On April 19, 1983, respondent filed a petition here for a writ of certiorari to the Alabama Supreme Court and an application for stay of execution addressed to JUSTICE POWELL as Circuit Justice. At approximately 5:45 p. m., e. s. t., on April 21, 1983, JUSTICE

POWELL, acting in his capacity as Circuit Justice, and with the concurrence of six other Members of the Court, denied respondent's application for a stay of execution pending disposition of his writ of certiorari to the Alabama Supreme Court. (See *post*, p. 1301.)

At 5:23 p. m., c. s. t., on April 21, respondent filed a petition for a writ of habeas corpus in the District Court for the Southern District of Alabama. At approximately 9:30 p. m., c. s. t., the District Court, stating that "the time available does not permit this Court to make a meaningful review or study," temporarily stayed the execution. The State sought an order from the Court of Appeals for the Eleventh Circuit vacating the stay. At 12:25 a. m., c. s. t., the court denied the motion, stating that "[b]ased upon the telephonic oral presentation by both parties to the Court we are unable to conclude that the District Judge has abused his discretion in granting the temporary stay . . . ." Pursuant to Alabama law, the warrant to carry out the execution expires at 11:59 p. m., c. s. t., on April 22, 1983.

The State seeks an order vacating the District Court's temporary stay. Respondent has filed a response in opposition to the State's application.

JUSTICE POWELL's order of April 21, 1983, denying respondent's application for a stay of execution, described the lengthy proceedings that have followed respondent's conviction and death sentence for first-degree murder committed during the course of a robbery in 1977. Respondent has exhausted his review by way of direct appeal and by way of the petition for a writ of habeas corpus filed in April 1979. He also has had his claims heard a second time by the Alabama Supreme Court acting on a petition for a new sentencing hearing. In sum, respondent's "constitutional challenges to Alabama's capital-sentencing procedures have been reviewed exhaustively and repetitively by several courts in both the state and federal systems." *Post*, at 1302 (POWELL, J., in chambers).

Following a brief hearing on the evening of April 21, 1983, the District Court found that "counsel for petitioner conceded that all issues raised in the petition were raised in the petition previously filed before [the United States District Court] except for the issue asserted in section 12 of the petition." Thus, in the latest petition for habeas corpus filed in this case, all but one of the grounds presented have been presented before and rejected.

The one new issue now raised by respondent is a claim that the Alabama courts applied a statutory aggravating factor in an unconstitutionally broad manner. The trial court found that on numerous prior occasions respondent "knowingly created a great risk of death to many persons. By Mr. Evans' testimony, he was involved in thirty armed robberies and nine kidnappings with [codefendant] Mr. Ritter, and further claims to have been involved in approximately 250 armed robberies prior to associating with Mr. Ritter." *Evans* v. *State*, 361 So. 2d 654, 663 (Ala. Crim. App. 1977). Respondent contends that by construing this statutory aggravating factor to encompass acts not involving the offense for which he was found guilty, the trial court construed the statute in an unconstitutionally broad manner.

Respondent does not appear to have raised this challenge at any time in any of the many prior state and federal proceedings in his case. Nor was the existence of this claim made known to this Court in any of the papers filed by respondent before JUSTICE POWELL's denial of respondent's application for a stay of execution. The claim thus was raised for the first time in respondent's second petition for a writ of habeas corpus, filed approximately seven hours before his scheduled execution. His only justification for raising this issue now is that, in his view, the decision in *Proffitt* v. *Wainwright*, 685 F. 2d 1227, 1265–1266 (CA11), decided in September 1982, some seven months ago, has changed the applicable law. *Proffitt*, however, does not address the question whether this particular aggravating factor may be applied to acts unrelated to the capital offense itself. The decision in that case only applies the principle established in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), that aggravating factors must be construed and applied in a nonarbitrary manner. On the facts of respondent's case, there was no violation of the *Godfrey* principle in finding this particular aggravating circumstance. Nor is there any question that application of this aggravating factor was proper under the Alabama statute as construed by the Alabama courts. After carefully reviewing the record, the Alabama Court of Criminal Appeals, in sustaining respondent's death sentence, stated: "The aggravating circumstances were here averred and proved at trial, and also determined by the trial judge in a public hearing, as required by law. In addition, this Court has weighed the aggravating and mitigating circumstances independently." 361 So. 2d, at 662.

Respondent's petition for a writ of habeas corpus filed on April 21, 1983, thus seeks to litigate several issues conclusively resolved in prior proceedings and a claim never before raised. This new claim, challenging the validity of one of the aggravating circumstances found to exist in this case, is a question of law as to which no further hearing is required. For the reasons stated above, we conclude that the claim is without merit.* Accordingly, the application of the State

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*In a case of this kind, a district court normally should find and state substantive grounds for granting a stay of execution. In the circumstances of this case, however, we understand the difficult situation in which the District Court found itself. Judge Cox was not the judge who had reviewed this case on the previous habeas corpus petition. Apparently without notice, this second habeas corpus petition and application for a stay of execution, filed by the same counsel who had filed the previous application for a stay in this Court, was not filed until about seven hours prior to the scheduled execution time. No explanation has been offered by counsel for the timing of these applications.

READEX FICHE

of Alabama to dissolve and vacate the stay ordered by the United States District Court is granted.

It is so ordered.

JUSTICE BRENNAN would deny the application.

CHIEF JUSTICE BURGER, concurring:

I agree with the Court's action vacating the temporary stay entered by Judge Emmett Cox, United States District Court, Mobile, Ala. This matter had never been before Judge Cox prior to April 21 and had been referred to him due to the absence of Judge William B. Hand, who had previously acted on the case and who was out of the State on judicial business. Far from being a matter in which there is hasty judicial action, this case has been heard and reviewed over the past six years, by not less than 14 state appellate judges and 13 federal judges, and this Court has previously acted on this case, see *Hopper* v. *Evans*, 456 U. S. 605 (1982).

This case falls within a familiar* pattern of literal "eleventh hour" efforts to frustrate judicial decrees after careful and painstaking judicial consideration over a period of years. For more than six months prior to April 21 the courts were open to consider the petition presented to Judge Cox at or about 5:30 p. m., Thursday, April 21, but counsel failed to present any application for relief during that period. At that late hour a petition that could have been presented long before was thrust upon a judge who had no previous contact with the case.

This Court is fully familiar with the records in the state and federal courts on Evans' case; the claim now presented is wholly without merit and the Court appropriately vacates the stay of execution granted yesterday.

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*See *Brooks* v. *Estelle*, 459 U. S. 1061 (1982), and *Mitchell* v. *Lawrence*, 458 U. S. 1123 (1982).

JUSTICE MARSHALL, dissenting.

It has long been recognized that this Court's power to dissolve a stay "should be exercised with the greatest of caution and should be reserved for exceptional circumstances." *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers). Exercise of this power is proper only where the record demonstrates that the grant of a stay was clearly an abuse of discretion. *Brown* v. *Chote*, 411 U. S. 452, 457 (1973).

On the basis of the papers before us, I am frankly at a loss to comprehend how the majority can conclude, in the brief time we have had to consider the matter, that the District Court abused its discretion in granting the stay and that the Court of Appeals erred in declining to vacate the stay. In his petition for a writ of habeas corpus, Evans claimed that the Alabama Supreme Court has never determined whether his sentence is proportional to his crime in light of the sentences received by other defendants in Alabama, and that the sentencing judge gave an unconstitutionally broad construction to one of the aggravating circumstances on which the sentence was based. Although the first claim was previously considered by a Federal District Court, the relevant law has changed since that earlier decision, see *Harris* v. *Pulley*, 692 F. 2d 1189 (CA9 1982), cert. granted, 460 U. S. 1036 (1983), and the decisions of this Court firmly establish that a state prisoner may relitigate a constitutional claim "upon showing an intervening change in the law." *Sanders* v. *United States*, 373 U. S. 1, 17 (1963). The second claim has never been considered by any federal court and finds support in the decision of the Court of Appeals for the Eleventh Circuit in *Proffitt* v. *Wainwright*, 685 F. 2d 1227, 1265–1266 (1982).

The District Court concluded that "the time available" did not "permit [the] meaningful review or study" that would be necessary to decide Evans' claims on the merits. *Evans* v.

Smith, Civ. Action No. 83-0391-H (SD Ala., Apr. 21, 1983). Under these circumstances, it was completely proper for the court to grant a stay of execution to afford an opportunity to decide whether Evans' death sentence is indeed unconstitutional.* As Justice Harlan once stated, when a prisoner under a sentence of death presents a constitutional claim, a court should grant a stay even if it has "grave doubt . . . as to whether [the prisoner] . . . presents any substantial federal question." *Edwards* v. *New York*, 76 S. Ct. 538, 100 L. Ed. 1523 (1956) (in chambers).

This Court's action today is particularly indefensible in view of the fact that Evans has never had an opportunity to respond to the supplementary papers that the State has filed in support of its application to vacate the stay. The State has done nothing to serve those papers, which were filed today, other than placing a copy in the mail. The papers obviously will not be received by Evans' counsel until after it is too late.

"It is . . . important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act

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*The issue before us is not affected by the fact that on April 21, 1983, JUSTICE POWELL, acting as Circuit Justice, denied an application for a stay of execution pending filing of a petition for certiorari to the Supreme Court of Alabama. *Post*, p. 1301. The standard governing an application for a stay pending the filing of a petition for certiorari is entirely different from the standard governing an application to *vacate* a stay granted by a lower court. A stay pending the filing of a petition for certiorari will be granted only where there is "'a reasonable probability that four Members of the Court would find that [the] case merits review.'" *Post*, at 1302. In denying the application for a stay, JUSTICE POWELL concluded that there was no such probability.

That determination has no bearing on the merits of the claims that respondent has presented to the District Court. Since the denial of certiorari "imports no expression of opinion upon the merits of a case," *House* v. *Mayo*, 324 U. S. 42, 48 (1945), certainly a conclusion by a Circuit Justice that the Court would deny certiorari likewise is not an expression of opinion upon the merits.

within the law." *Rosenberg* v. *United States*, 346 U. S. 273, 321 (1953) (Douglas, J., dissenting). The execution of Evans prior to a decision of his claims on the merits will ensure that such certainty is never achieved.

I dissent. The world will not come to an end if the execution is stayed at least until Monday, to permit the District Court to hold a hearing.

OLIM ET AL. *v.* WAKINEKONA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1581. Argued January 19, 1983—Decided April 26, 1983

Petitioner members of a prison "Program Committee," after investigating a breakdown in discipline and the failure of certain programs within the maximum control unit of the Hawaii State Prison outside Honolulu, singled out respondent and another inmate as troublemakers. After a hearing—respondent having been notified thereof and having retained counsel to represent him—the same Committee recommended that respondent's classification as a maximum security risk be continued and that he be transferred to a prison on the mainland. Petitioner administrator of the Hawaii prison accepted the Committee's recommendation, and respondent was transferred to a California state prison. Respondent then filed suit against petitioners in Federal District Court, alleging that he had been denied procedural due process because the Committee that recommended his transfer consisted of the same persons who had initiated the hearing, contrary to a Hawaii prison regulation, and because the Committee was biased against him. The District Court dismissed the complaint, holding that the Hawaii regulations governing prison transfers did not create a substantive liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The Court of Appeals reversed.

Held:

1. An interstate prison transfer does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself. Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State so as to implicate the Due Process Clause directly when an intrastate prison transfer is made, ***Meachum*** v. *Fano*, 427 U. S. 215; *Montanye* v. *Haymes*, 427 U. S. 236, he has no justifiable expectation that he will be incarcerated in any particular State. Statutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other States. Confinement in another State is within the normal limits or range of custody which the conviction has authorized the transferring State to impose. Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. Pp. 244-248.

2. Nor do Hawaii's prison regulations create a constitutionally protected liberty interest. Although a State creates a protected liberty in-

terest by placing substantive limitations on official discretion, Hawaii's prison regulations place no substantive limitations on the prison administrator's discretion to transfer an inmate. For that matter, the regulations prescribe no substantive standards to guide the Program Committee whose task is to advise the administrator. Thus no significance attaches to the fact that the prison regulations require a particular kind of hearing before the administrator can exercise his unfettered discretion. Pp. 248–251.

664 F. 2d 708, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Part I of which STEVENS, J., joined, *post*, p. 251.

Michael A. Lilly, First Deputy Attorney General of Hawaii, argued the cause for petitioners. With him on the brief was *James H. Dannenberg*, Deputy Attorney General.

Robert Gilbert Johnston argued the cause for respondent. With him on the brief was *Clayton C. Ikei.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Paul L. Douglas*, Attorney General of Nebraska, *J. Kirk Brown*, Assistant Attorney General, *Judith W. Rogers*, Corporation Counsel of the District of Columbia, and the Attorneys General for their respective jurisdictions as follows: *Wilson L. Condon* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, *Jim Smith* of Florida, *David H. Leroy* of Idaho, *William J. Guste, Jr.*, of Louisiana, *William A. Allain* of Mississippi, *Michael T. Greely* of Montana, *Richard H. Bryan* of Nevada, *Irwin I. Kimmelman* of New Jersey, *Jeff Bingaman* of New Mexico, *Rufus L. Edmisten* of North Carolina, *Robert Wefald* of North Dakota, *William J. Brown* of Ohio, *Dennis J. Roberts II* of Rhode Island, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.*, of Tennessee, *John J. Easton* of Vermont, *Gerald L. Baliles* of Virginia, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven F. Freudenthal* of Wyoming; and for the Commonwealth of Massachusetts et al. by *Francis X. Bellotti*, Attorney General of Massachusetts, *Stephen R. Delinsky*, *Barbara A. H. Smith*, and *Leo J. Cushing*, Assistant Attorneys General, *Anthony Ching*, Solicitor General of Arizona, and the Attorneys General for their respective jurisdictions as follows: *Wilson L. Condon* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether the transfer of a prisoner from a state prison in Hawaii to one in California implicates a liberty interest within the meaning of the Due Process Clause of the Fourteenth Amendment.

I

A

Respondent Delbert Kaahanui Wakinekona is serving a sentence of life imprisonment without the possibility of parole as a result of his murder conviction in a Hawaii state court. He also is serving sentences for various other crimes, including rape, robbery, and escape. At the Hawaii State Prison outside Honolulu, respondent was classified as a maximum security risk and placed in the maximum control unit.

Petitioner Antone Olim is the Administrator of the Hawaii State Prison. The other petitioners constituted a prison "Program Committee." On August 2, 1976, the Committee held hearings to determine the reasons for a breakdown in discipline and the failure of certain programs within the prison's maximum control unit. Inmates of the unit appeared at these hearings. The Committee singled out respondent and another inmate as troublemakers. On August 5, respondent received notice that the Committee, at a hearing to be held on August 10, would review his correctional program to determine whether his classification within the system should be changed and whether he should be transferred to another Hawaii facility or to a mainland institution.

Jim Smith of Florida, *David H. Leroy* of Idaho, *William A. Allain* of Mississippi, *Michael T. Greely* of Montana, *Irwin I. Kimmelman* of New Jersey, *Jeff Bingaman* of New Mexico, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *William J. Brown* of Ohio, *Dennis J. Roberts II* of Rhode Island, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.*, of Tennessee, *John J. Easton* of Vermont, *Chauncey H. Browning* of West Virginia, and *Bronson C. La Follette* of Wisconsin.

The August 10 hearing was conducted by the same persons who had presided over the hearings on August 2. Respondent retained counsel to represent him. The Committee recommended that respondent's classification as a maximum security risk be continued and that he be transferred to a prison on the mainland. He received the following explanation from the Committee:

> "The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at [the maximum control unit] because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland." App. 7–8.

Petitioner Olim, as Administrator, accepted the Committee's recommendation, and a few days later respondent was transferred to Folsom State Prison in California.

B

Rule IV of the Supplementary Rules and Regulations of the Corrections Division, Department of Social Services and Housing, State of Hawaii, approved in June 1976, recites that the inmate classification process is not concerned with punishment. Rather, it is intended to promote the best interests of the inmate, the State, and the prison community.[1] Paragraph 3 of Rule IV requires a hearing prior to a prison transfer involving "a grievous loss to the inmate," which the Rule defines "generally" as "a serious loss to a reasonable man." App. 21.[2] The Administrator, under ¶2 of the Rule, is required to establish "an impartial Program Committee" to conduct such a hearing, the Committee to be "composed of at least three members who were not actively involved in the process by which the inmate . . . was brought before the Committee." App. 20. Under ¶3, the Committee must give the inmate written notice of the hearing, permit him, with certain stated exceptions, to confront and cross-examine witnesses, afford him an opportunity to be heard, and apprise him of the Committee's findings. App. 21–24.[3]

The Committee is directed to make a recommendation to the Administrator, who then decides what action to take:

> "[The Administrator] may, as the final decisionmaker:
>
> "(a) Affirm or reverse, in whole or in part, the recommendation; or
>
> "(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate

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[1] Paragraph 1 of Rule IV states:

"An inmate's . . . classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates . . . , the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division." App. 20.

[2] Petitioners concede, "for purposes of the argument," that respondent suffered a "grievous loss" within the meaning of Rule IV when he was transferred from Hawaii to the mainland. Tr. of Oral Arg. 9, 25.

[3] Rule V provides that an inmate may retain legal counsel if his hearing concerns a "potential Interstate transfer." App. 25.

> . . . , other inmates . . . , institution, or community and refer the matter back to the Program Committee for further study and recommendation." Rule IV, ¶3d(3), App. 24.

The regulations contain no standards governing the Administrator's exercise of his discretion. See *Lono* v. *Ariyoshi*, 63 Haw. 138, 144–145, 621 P. 2d 976, 980–981 (1981).

C

Respondent filed suit under 42 U. S. C. § 1983 against petitioners as the state officials who caused his transfer. He alleged that he had been denied procedural due process because the Committee that recommended his transfer consisted of the same persons who had initiated the hearing, this being in specific violation of Rule IV, ¶2, and because the Committee was biased against him. The United States District Court for the District of Hawaii dismissed the complaint, holding that the Hawaii regulations governing prison transfers do not create a substantive liberty interest protected by the Due Process Clause. 459 F. Supp. 473 (1978).[4]

The United States Court of Appeals for the Ninth Circuit, by a divided vote, reversed. 664 F. 2d 708 (1981). It held that Hawaii had created a constitutionally protected liberty interest by promulgating Rule IV. In so doing, the court declined to follow cases from other Courts of Appeals holding that certain procedures mandated by prison transfer regulations do not create a liberty interest. See, *e. g.*, *Cofone* v. *Manson*, 594 F. 2d 934 (CA2 1979); *Lombardo* v. *Meachum*, 548 F. 2d 13 (CA1 1977). The court reasoned that Rule IV gives Hawaii prisoners a justifiable expectation that they will not be transferred to the mainland absent a hearing, before an impartial committee, concerning the facts alleged in the prehearing notice.[5] Because the Court of Appeals' decision created a conflict among the Circuits, and because the case presents the further question whether the Due Process Clause in and of itself protects against interstate prison transfers, we granted certiorari. 456 U. S. 1005 (1982).

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[4] Respondent also had alleged that the transfer violated the Hawaii Constitution and state regulations and statutes. In light of its dismissal of respondent's federal claims, the District Court declined to exercise pendent jurisdiction over these state-law claims. 459 F. Supp., at 476.

II

In *Meachum* v. *Fano*, 427 U. S. 215 (1976), and *Montanye* v. *Haymes*, 427 U. S. 236 (1976), this Court held that an *intrastate* prison transfer does not directly implicate the Due Process Clause of the Fourteenth Amendment. In *Meachum*, inmates at a Massachusetts medium security prison had been transferred to a maximum security prison in that Commonwealth. In *Montanye*, a companion case, an inmate had been transferred from one maximum security New York prison to another as punishment for a breach of prison rules. This Court rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum*, 427 U. S., at 224 (emphasis in original). It went on to state:

> "The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's lib-

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[5] Several months before the Court of Appeals handed down its decision, the Supreme Court of Hawaii had held that because Hawaii's prison regulations do not limit the Administrator's discretion to transfer prisoners to the mainland, they do not create any liberty interest. *Lono* v. *Ariyoshi*, 63 Haw. 138, 621 P. 2d 976 (1981). In a petition for rehearing in the present case, petitioners directed the Ninth Circuit's attention to the *Lono* decision. See 664 F. 2d, at 714. The Court of Appeals, however, concluded that the Hawaii court's interpretation of the regulations was not different from its own; the Hawaii court merely had reached a different result on the "federal question." The Court of Appeals thus adhered to its resolution of the case. *Id.*, at 714–715.

> erty interest to empower the State to confine him in *any* of its prisons.
>
> "Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Id.*, at 224–225 (emphasis in original).

The Court observed that, although prisoners retain a residuum of liberty, see *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974), a holding that "*any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." 427 U. S., at 225 (emphasis in original).

Applying the *Meachum* and *Montanye* principles in *Vitek* v. *Jones*, 445 U. S. 480 (1980), this Court held that the transfer of an inmate from a prison to a mental hospital did implicate a liberty interest. Placement in the mental hospital was "not within the range of conditions of confinement to which a prison sentence subjects an individual," because it brought about "consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Id.*, at 493. Respondent argues that the same is true of confinement of a Hawaii prisoner on the mainland, and that *Vitek* therefore controls.

We do not agree. Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State.[6] Often, confinement in the inmate's home State will not be possible. A person convicted of a federal crime in a State without a federal correctional facility usually will serve his sentence in another State. Overcrowding and the need to separate particular prisoners may necessitate interstate transfers. For any number of reasons, a State may lack prison facilities capable of providing appropriate correctional programs for all offenders.

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[6] Indeed, in *Vitek* itself the Court did not read *Meachum* and *Montanye* as stating a rule applicable only to intrastate transfers. The Court stated: "In *Meachum* v. *Fano* . . . and *Montanye* v. *Haymes* . . . we held that the

Statutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other States. On the federal level, 18 U. S. C. § 5003(a) authorizes the Attorney General to contract with a State for the transfer of a state prisoner to a federal prison, whether in that State or another. See *Howe* v. *Smith*, 452 U. S. 473 (1981).[7] Title 18 U. S. C. § 4002 (1976 ed. and Supp. V) permits the Attorney General to contract with any State for the placement of a federal prisoner in state custody for up to three years. Neither statute requires that the prisoner remain in the State in which he was convicted and sentenced.

On the state level, many States have statutes providing for the transfer of a state prisoner to a federal prison, *e. g.*, Haw. Rev. Stat. § 353-18 (1976), or another State's prison, *e. g.*, Alaska Stat. Ann. § 33.30.100 (1982). Corrections compacts between States, implemented by statutes, authorize incarceration of a prisoner of one State in another State's prison. See, *e. g.*, Cal. Penal Code Ann. § 11189 (West 1982) (codifying Interstate Corrections Compact); § 11190 (codifying Western Interstate Corrections Compact); Conn. Gen.

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transfer of a prisoner *from one prison to another* does not infringe a protected liberty interest." 445 U. S., at 489 (emphasis added). The Court's other cases describing *Meachum* and *Montanye* also have eschewed the narrow reading respondent now proposes. See *Hewitt* v. *Helms*, 459 U. S. 460, 467-468 (1983); *Moody* v. *Daggett*, 429 U. S. 78, 88, n. 9 (1976).

[7] This statute has been invoked to transfer prisoners from Hawaii state facilities to federal prisons on the mainland. See *Anthony* v. *Wilkinson*, 637 F. 2d 1130 (CA7 1980), vacated and remanded *sub nom. Hawaii* v. *Mederios*, 453 U. S. 902 (1981).

Stat. § 18–102 (1981) (codifying New England Interstate Corrections Compact); § 18–106 (codifying Interstate Corrections Compact); Haw. Rev. Stat. § 355–1 (1976) (codifying Western Interstate Corrections Compact); Idaho Code § 20–701 (1979) (codifying Interstate Corrections Compact); Ky. Rev. Stat. § 196.610 (1982) (same). And prison regulations such as Hawaii's Rule IV anticipate that inmates sometimes will be transferred to prisons in other States.

In short, it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced, or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State. Confinement in another State, unlike confinement in a mental institution, is "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum*, 427 U. S., at 225.[8] Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. The difference between such a transfer and an intrastate or interstate transfer of shorter distance is a matter of degree, not of kind,[9] and *Meachum* instructs that "the determining factor is the nature of the interest involved rather than its weight." 427 U. S., at 224. The reasoning of *Meachum* and *Montanye* compels the conclusion that an interstate prison transfer, including one from Hawaii to California, does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself.

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[8] After the decisions in *Meachum* and *Montanye*, courts almost uniformly have held that an inmate has no entitlement to remain in a prison in his home State. See *Beshaw* v. *Fenton*, 635 F. 2d 239, 246–247 (CA3 1980), cert. denied, 453 U. S. 912 (1981); *Cofone* v. *Manson*, 594 F. 2d 934, 937, n. 4 (CA2 1979); *Sisbarro* v. *Warden*, 592 F. 2d 1, 3 (CA1), cert. denied, 444 U. S. 849 (1979); *Fletcher* v. *Warden*, 467 F. Supp. 777, 779–780 (Kan. 1979); *Curry-Bey* v. *Jackson*, 422 F. Supp. 926, 931–933 (DC 1976); *McDonnell* v. *United States Attorney General*, 420 F. Supp. 217, 220 (ED Ill. 1976); *Goodnow* v. *Perrin*, 120 N. H. 669, 671, 421 A. 2d 1008, 1010 (1980); *Girouard* v. *Hogan*, 135 Vt. 448, 449–450, 378 A. 2d 105, 106–107 (1977); *In re Young*, 95 Wash. 2d 216, 227–228, 622 P. 2d 373, 379 (1980); cf. *Fajeriak* v. *McGinnis*, 493 F. 2d 468 (CA9 1974) (pre-*Meachum* transfers from Alaska to other States); *Hillen* v. *Director of Department of Social Services*, 455 F. 2d 510 (CA9), cert. denied, 409 U. S. 989 (1972) (pre-*Meachum* transfer from Hawaii to California). But see *In re Young*, 95 Wash. 2d, at 233, 622 P. 2d, at 382 (concurring opinion); *State ex rel. Olson* v. *Maxwell*, 259 N. W. 2d 621 (N. D. 1977); cf. *Tai* v. *Thompson*, 387 F. Supp. 912 (Haw. 1975) (pre-*Meachum* transfer).

III

The Court of Appeals held that Hawaii's prison regulations create a constitutionally protected liberty interest. In *Meachum*, however, the State had "conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct," 427 U. S., at 226, and "ha[d] not represented that transfers [would] occur only on the occurrence of certain events," *id.*, at 228. Because the State had retained "discretion to transfer [the prisoner] for whatever reason or for no reason at all," *ibid.*, the Court found that the State had not created a constitutionally protected liberty interest. Similarly, because the state law at issue in *Montanye* "impose[d] no conditions on the discretionary power to transfer," 427 U. S., at 243, there was no basis for invoking the protections of the Due Process Clause.

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[9] Respondent's argument to the contrary is unpersuasive. The Court in *Montanye* took note that among the hardships that may result from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. 427 U. S., at 241, n. 4. These are the same hardships respondent faces as a result of his transfer from Hawaii to California.

Respondent attempts to analogize his transfer to banishment in the English sense of "beyond the seas," arguing that banishment surely is not within the range of confinement justified by his sentence. But respondent in no sense has been banished; his conviction, not the transfer, deprived him of his right freely to inhabit the State. The fact that his confinement takes place outside Hawaii is merely a fortuitous consequence of the fact that he must be confined, not an additional element of his punishment. See *Girouard* v. *Hogan*, 135 Vt., at 449–450, 378 A. 2d, at 106–107. Moreover, respondent has not been exiled; he remains within the United States.

In essence, respondent's banishment argument simply restates his claim that a transfer from Hawaii to the mainland is different in kind from other transfers. As has been shown in the text, however, respondent's transfer was authorized by his conviction. A conviction, whether in Hawaii, Alaska, or one of the contiguous 48 States, empowers the State to confine the inmate in any penal institution in any State unless there is state law to the contrary or the reason for confining the inmate in a particular institution is itself constitutionally impermissible. See *Montanye*, 427 U. S., at 242; *id.*, at 244 (dissenting opinion); *Cruz* v. *Beto*, 405 U. S. 319 (1972); *Fajeriak* v. *McGinnis*, 493 F. 2d, at 470.

These cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 467 (1981) (BRENNAN, J., concurring). If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," *ibid.*, the State has not created a constitutionally protected liberty interest. See *id.*, at 466–467 (opinion of the Court); see also *Vitek* v. *Jones*, 445 U. S., at 488–491 (summarizing cases).

Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono* v. *Ariyoshi*, 63 Haw., at 144–145, 621 P. 2d, at 980–981, the prison Administrator's discretion to transfer an inmate is completely unfettered. No standards govern or restrict the Administrator's determination. Because the Administrator is the only decisionmaker under Rule IV, we need not decide whether the introductory paragraph of Rule IV, see n. 1, *supra*, places any substantive limitations on the purely advisory Program Committee.[10]

The Court of Appeals thus erred in attributing significance to the fact that the prison regulations require a particular kind of hearing before the Administrator can exercise his unfettered discretion.[11] As the United States Court of Appeals for the Seventh Circuit recently stated in *Shango* v. *Jurich*, 681 F. 2d 1091, 1100–1101 (1982), "[a] liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality."[12] Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. See generally Simon, Liberty and Property in the Supreme Court: A Defense of *Roth* and *Perry*, 71 Calif. L. Rev. 146, 186 (1983). If officials may transfer a prisoner "for whatever reason or for no reason at all," *Meachum*, 427 U. S., at 228, there is no such interest for process to protect. The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course,[13] but in making that choice the State does not create an independent substantive right. See *Hewitt* v. *Helms*, 459 U. S. 460, 471 (1983).

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[10] In *Hewitt* v. *Helms*, 459 U. S. 460 (1983), unlike this case, state law limited the decisionmakers' discretion. To the extent the dissent doubts that the Administrator's discretion under Rule IV is truly unfettered, *post*, at 258, and n. 11, it doubts the ability or authority of the Hawaii Supreme Court to construe state law.

[11] In *Meachum* itself, the Court of Appeals had interpreted the applicable regulations as entitling inmates to a pretransfer hearing, see *Fano* v. *Meachum*, 520 F. 2d 374, 379–380 (CA1 1975), but this Court held that state law created no liberty interest.

[12] Other courts agree that an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause. See, *e. g.*, *United States* v. *Jiles*, 658 F. 2d 194, 200 (CA3 1981), cert. denied, 455 U. S. 923 (1982); *Bills* v. *Henderson*, 631 F. 2d 1287, 1298–1299 (CA6 1980); *Pugliese* v. *Nelson*, 617 F. 2d 916, 924–925 (CA2 1980); *Cofone* v. *Manson*, 594 F. 2d, at 938; *Lombardo* v. *Meachum*, 548 F. 2d 13, 14–16 (CA1 1977); *Adams* v. *Wainwright*, 512 F. Supp. 948, 953 (ND Fla. 1981); *Lono* v. *Ariyoshi*, 63 Haw., at 144–145, 621 P. 2d, at 980–981.

IV

In sum, we hold that the transfer of respondent from Hawaii to California did not implicate the Due Process Clause directly, and that Hawaii's prison regulations do not create a protected liberty interest.[14] Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, and with whom JUSTICE STEVENS joins as to Part I, dissenting.

In my view, the transfer of respondent Delbert Kaahanui Wakinekona from a prison in Hawaii to a prison in California implicated an interest in liberty protected by the Due Process Clause of the Fourteenth Amendment. I respectfully dissent.

I

An inmate's liberty interest is not limited to whatever a State chooses to bestow upon him. An inmate retains a significant residuum of constitutionally protected liberty following his incarceration independent of any state law. As we stated in *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974): "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] may not be deprived of life, liberty, or property without due process of law."

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[13] Petitioners assert that the hearings required by Rule IV not only enable the officials to gather information and thereby to exercise their discretion intelligently, but also have a therapeutic purpose: inmate participation in the decisionmaking process, it is hoped, reduces tension in the prison. See Tr. of Oral Arg. 52–53.

[14] In light of this conclusion, respondent's claim of bias in the composition of the prison Program Committee becomes irrelevant.

In determining whether a change in the conditions of imprisonment implicates a prisoner's retained liberty interest, the relevant question is whether the change constitutes a sufficiently "grievous loss" to trigger the protection of due process. *Vitek* v. *Jones*, 445 U. S. 480, 488 (1980). See *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), citing *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The answer depends in part on a comparison of "the treatment of the particular prisoner with the customary, habitual treatment of the population of the prison as a whole." *Hewitt* v. *Helms*, 459 U. S. 460, 486 (1983) (STEVENS, J., dissenting). This principle was established in our decision in *Vitek*, which held that the transfer of an inmate from a prison to a mental hospital implicated a liberty interest because it brought about "consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of crime." 445 U. S., at 493. Because a significant qualitative change in the conditions of confinement is not "within the range of conditions of confinement to which a prison sentence subjects an individual," *ibid.*, such a change implicates a prisoner's protected liberty interest.

There can be little doubt that the transfer of Wakinekona from a Hawaii prison to a prison in California represents a substantial qualitative change in the conditions of his confinement. In addition to being incarcerated, which is the ordinary consequence of a criminal conviction and sentence, Wakinekona has in effect been banished from his home, a punishment historically considered to be "among the severest."[1] For an indeterminate period of time, possibly the rest of his life, nearly 2,500 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment.

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[1] 4 J. Elliott, Debates on the Federal Constitution 555 (1836). Whether it is called banishment, exile, deportation, relegation, or transportation, compelling a person "to quit a city, place, or country, for a specified period of time, or for life," has long been considered a unique and severe deprivation, and was specifically outlawed by "[t]he twelfth section of the English

I cannot agree with the Court that *Meachum* v. *Fano*, 427 U. S. 215 (1976), and *Montanye* v. *Haymes*, 427 U. S. 236, 243 (1976), compel the conclusion that Wakinekona's transfer implicates no liberty interest. *Ante*, at 248. Both cases involved transfers of prisoners between institutions located within the same State in which they were convicted, and the Court expressly phrased its holdings in terms of *intra*state transfers.[2] Both decisions rested on the premise that no liberty interest is implicated by an initial decision to place a prisoner in one institution in the State rather than another. See *Meachum*, *supra*, at 224; *Montanye*, *supra*, at 243. On the basis of that premise, the Court concluded that the subsequent transfer of a prisoner to a different facility within the State likewise implicates no liberty interest. In this case, however, we cannot assume that a State's initial placement of an individual in a prison far removed from his family and residence would raise no due process questions. None of our

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Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty." *United States* v. *Ju Toy*, 198 U. S. 253, 269–270 (1905) (Brewer, J., dissenting).

[2] Thus in *Meachum* the Court stated that the State, by convicting the defendant, was "empower[ed] to confine him in any of its prisons," 427 U. S., at 224 (emphasis deleted), that a "transfer from one institution to another within the state prison system" implicated no due process interest, *id.*, at 225, and that "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Ibid.* See also *Montanye*, 427 U. S., at 242 ("We held in *Meachum* v. *Fano*, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State").

prior decisions has indicated that such a decision would be immune from scrutiny under the Due Process Clause.

Actual experience simply does not bear out the Court's assumptions that interstate transfers are routine and that it is "not unusual" for a prisoner "to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced." *Ante*, at 247. In Hawaii less than three percent of the state prisoners were transferred to prisons in other jurisdictions in 1979, and on a nationwide basis less than one percent of the prisoners held in state institutions were transferred to other jurisdictions.[3] Moreover, the vast majority of state prisoners are held in facilities located less than 250 miles from their homes.[4] Measured against these norms, Wakinekona's transfer to a California prison represents a punishment "qualitively different from the punishment characteristically suffered by a person convicted of crime." *Vitek* v. *Jones*, *supra*, at 493.

I therefore cannot agree that a State may transfer its prisoners at will, to any place, for any reason, without ever implicating any interest in liberty protected by the Due Process Clause.

II

Nor can I agree with the majority's conclusion that Hawaii's prison regulations do not create a liberty interest. This Court's prior decisions establish that a liberty interest may be "created"[5] by state laws, prison rules, regulations, or practices. State laws that impose substantive criteria which limit or guide the discretion of officials have been held to create a protected liberty interest. See, *e. g., Hewitt* v. *Helms*, 459 U. S. 460 (1983); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979); *Wright* v. *Enomoto*, 462 F. Supp. 397 (ND Cal. 1976), summarily aff'd, 434 U. S. 1052 (1978). By contrast, a liberty interest is not created by a law which "imposes no conditions on [prison officials'] discretionary power," *Montanye, supra*, at 243, authorizes prison officials to act "for whatever reason or for no reason at all," *Meachum, supra*, at 228, or accords officials "unfettered discretion," *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 466 (1981).

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[3] U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1981, Table 6.27, pp. 478–479 (T. Flanagan, D. Van Alstyne, & M. Gottfredson eds. 1982). These figures reflect "all inmates who were transferred from one State's jurisdiction to another to continue sentences already in force," and "[d]oes not include the release if [the] State does not relinquish jurisdiction." *Id.*, at 590.

[4] U. S. Dept. of Justice, Profile of State Prison Inmates: Sociodemographic Findings from the 1974 Survey of Inmates of State Correctional Facilities 1 (1979). Over 70 percent of state inmates are held in institutions located less than 250 miles from their homes.

The Court misapplies these principles in concluding that Hawaii's prison regulations leave prison officials with unfettered discretion to transfer inmates. *Ante*, at 249–250. Rule IV establishes a scheme under which inmates are classified upon initial placement in an institution, and must subsequently be reclassified before they can be transferred to another institution. Under the Rule the standard for classifying inmates is their "optimum placement within the Corrections Division" in light of the "best interests of the individual, the State, and the community."[6] In classifying inmates, the Program

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[5] But see *Hewitt* v. *Helms*, 459 U. S. 460, 488 (1983) (STEVENS, J., dissenting) (Prison regulations "provide evidentiary support for the conclusion that the transfer affects a constitutionally protected interest in liberty," but they "do not *create* that interest" (emphasis in original)).

[6] Paragraph 1 of Rule IV provides:

"An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on

Committee may not consider punitive aims. It may consider only factors relevant to determining where the individual will be "best situated," such as "his history, his changing needs, the resources and facilities available to the Corrections Divisions, the other inmates/wards, the exigencies of the community, and any other relevant factors." Paragraph 3 of Rule IV establishes a detailed set of procedures applicable when, as in this case, the reclassification of a prisoner may lead to a transfer involving a "grievous loss," a phrase contained in the Rule itself.[7] The procedural rules are cast in mandatory language, and cover such matters as notice, access to information, hearing, confrontation and cross-examination, and the basis on which the Committee is to make its recommendation to the facility administrator.

The limitations imposed by Rule IV are at least as substantial as those found sufficient to create a liberty interest in *Hewitt* v. *Helms*, *supra*, decided earlier this Term. In *Hewitt* an inmate contended that his confinement in administrative custody implicated an interest in liberty protected by the Due Process Clause. State law provided that a prison official could place inmates in administrative custody "upon his assessment of the situation and the need for control," or "where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others," and mandated certain procedures such as notice and a

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the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division." App. 20.

[7] While the term "grievous loss" is not explicitly defined, the prison regulations treat a transfer to the mainland as a grievous loss entitling an inmate to the procedural rights established in Rule IV, ¶3. This is readily inferred from Rule IV, ¶3, which states that intrastate transfers do not involve a grievous loss, and Rule V, which permits inmates to retain counsel only in specified circumstances, one of which is a reclassification that may result in an interstate transfer. App. 25.

hearing.[8] This Court construed the phrases "'the need for control,' or 'the threat of a serious disturbance,'" as "substantive predicates" which restricted official discretion. *Id.*, at 472. These restrictions, in combination with the mandatory procedural safeguards, "deman[ded] a conclusion that the State has created a protected liberty interest." *Ibid.*

Rule IV is not distinguishable in any meaningful respect from the provisions at issue in *Helms*. The procedural requirements contained in Rule IV are, if anything, far more elaborate than those involved in *Helms*, and are likewise couched in "language of an unmistakably mandatory character." *Id.*, at 471. Moreover, Rule IV, to no less an extent than the state law at issue in *Helms*, imposes substantive criteria restricting official discretion. In *Helms* this Court held that a statutory phrase such as "the need for control" constituted a limitation on the discretion of prison officials to place inmates in administrative custody. In my view Rule IV, which states that transfers are intended to ensure an inmate's "optimum placement" in accordance with considerations which include "his changing needs [and] the resources and facilities available to the Corrections Division," also restricts official discretion in ordering transfers.[9]

The Court suggests that, even if the Program Committee does not have unlimited discretion in making recommendations for classifications and transfers, this cannot give rise to a state-created liberty interest because the prison Administrator retains "completely unfettered" "discretion to transfer an inmate," *ante*, at 249. I disagree. Rule IV, ¶3(d)(3), provides for review by the prison Administrator of recommendations forwarded to him by the Program Committee.[10] Even if this provision must be construed as authorizing the Administrator to transfer a prisoner for wholly arbitrary reasons,[11] that mere possibility does not defeat the protectible expectation otherwise created by Hawaii's reclassification and transfer scheme that transfers will take place only if required to ensure an inmate's optimum placement. In *Helms* a prison regulation also left open the possibility that the Superintendent could decide, for any reason or no reason at all, whether an inmate should be confined in administrative custody.[12] This Court nevertheless held that the state scheme as a whole created an interest in liberty protected by the Due Process Clause. 459 U. S., at 471–472. *Helms* thus necessarily rejects the view that state laws which impose substantive limitations and elaborate procedural requirements on official conduct create no liberty interest solely because there remains the possibility that an official will act in an arbitrary manner at the end of the process.[13]

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[8] See 459 U. S., at 470–471, n. 6.

[9] See also *Wright* v. *Enomoto*, 462 F. Supp. 397 (ND Cal. 1976), summarily aff'd, 434 U. S. 1052 (1978). In that case, the District Court held that the language of a prison *policy statement*, stating that "[i]nmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons," 462 F. Supp., at 403, was sufficient to create a protected expectation that an inmate would not be segregated for arbitrary reasons. See also *Bills* v. *Henderson*, 631 F. 2d 1287, 1293 (CA6 1980), cert. denied, 449 U. S. 1093 (1981); *Winsett* v. *McGinnes*, 617 F. 2d 996, 107 (CA3 1980) (en banc).

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[10] Rule IV, ¶3(d)(3), provides:

"The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

"(a) Affirm or reverse, in whole or in part, the recommendation; or

"(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation." App. 21.

[11] I doubt that Rule IV would be construed to permit the Administrator to order a transfer for punitive reasons, since Rule IV expressly disallows punitive transfers.

[12] That provision stated: "All decisions of the Program Review Committee shall be reviewed by the Superintendent for his sustaining the decision or amending or reversing the decision in favor of the inmate." Pennsylvania Bureau of Correction Administrative Directive BC–ADM 801, Rule III(H)(7). App. to Brief for Respondent in *Hewitt* v. *Helms*, O. T. 1982, No. 81–638, p. 12a. Because an inmate could be confined in administrative custody only if the Program Review Committee determined that such confinement is and continues to be "appropriate," *id.*, at 18a, the Superintendent in *Helms* was the "decisionmaker," *ante*, at 249–250, who determined whether inmates would be held in administrative custody.

For the foregoing reasons, I dissent.

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[13] This view was also implicitly rejected in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979). The Court held that the Nebraska statute governing the decision whether or not to grant parole created a "protectible entitlement," *id.*, at 12, even though the statute, which listed a number of factors to be considered in the parole decision, also authorized the Parole Board to deny parole on the basis of "[a]ny other factors the board determines to be relevant." *Id.*, at 18.

To the extent that *Lono* v. *Ariyoshi*, 63 Haw. 138, 144–145, 621 P. 2d 976, 980–981 (1981), on which the majority relies, *ante*, at 249, suggests that no liberty interest is created as state law has not entirely eliminated the possibility of arbitrary action, it is inconsistent with both *Helms* and *Greenholtz*.

JIM McNEFF, INC. *v.* TODD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-2150. Argued January 17, 1983—Decided April 27, 1983

Section 8(f) of the National Labor Relations Act (NLRA) authorizes construction industry employers and unions to enter into so-called "prehire" agreements setting the terms and conditions of employment for workers hired by the signatory employer without the union's majority status first having been established under § 9 of the Act. Section 8(f) also provides that such an agreement shall not bar a petition for a representative election under § 9. A local union and a contractors association entered into a Master Labor Agreement which provided that work at jobsites was to be performed only by subcontractors who had signed a labor agreement with the union and that covered employees, including those of subcontractors, must become union members. The agreement also required employers to make monthly contributions to fringe benefit trust funds on behalf of covered employees. When petitioner subcontractor began work on a jobsite, it was not a signatory to a labor agreement with the union, and none of its employees on the jobsite were union members. Upon being notified by representatives of the union and the general contractor that it was required to do so, petitioner became a signatory to the Master Labor Agreement, and its employees signed union cards. After petitioner submitted monthly reports to the union trust funds, falsely stating that "no members of this craft were employed during this month," petitioner on several occasions postponed audits requested by respondents, the trustees of the funds, to verify the monthly reports. Respondents then filed suit in Federal District Court under § 301 of the Labor Management Relations Act to compel an accounting and to recover payment of any trust fund contributions found to be due. The District Court entered summary judgment for respondents and ordered payment of unpaid contributions. The Court of Appeals affirmed.

Held: Monetary obligations assumed by an employer under a prehire contract authorized by § 8(f) may be recovered in a § 301 action brought by a union prior to repudiation of the contract by the employer, even though the union has not obtained majority support in the relevant unit. Pp. 265-272.

(a) In authorizing § 8(f) prehire contracts even though the union's majority status was not first established, Congress recognized that because of the uniquely temporary, transitory, and sometimes seasonal nature of construction industry employment, unions often would not be able to establish majority support with respect to many bargaining units. Congress also recognized that an employer must know labor costs in preparing contract bids and must have available a supply of skilled craftsmen for quick referral. Pp. 265–267.

(b) The question presented was not decided by *NLRB* v. *Iron Workers*, 434 U. S. 335, which held that § 8(b)(7)(C) of the NLRA, prohibiting picketing to force an employer to recognize a union that is not the certified representative of the employees in the relevant unit, was violated by a union's picketing to enforce a § 8(f) contract with the employer where the union had failed to request a timely representative election. That decision was based on Congress' intent, when it enacted § 8(f), to protect employees' rights to select their own bargaining representatives, and to ensure that prehire agreements are arrived at voluntarily and are voidable until the union attains majority support in the relevant unit. However, union enforcement, by way of a § 301 suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent, or trench on the voluntary and voidable characteristics of a § 8(f) prehire agreement. Allowing an action such as respondents' vindicates Congress' policies in authorizing prehire contracts to meet problems unique to the construction industry. When a § 8(f) agreement is voluntarily executed, as here, both parties must abide by its terms until it is repudiated. Pp. 267–271.

667 F. 2d 800, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

James T. Winkler argued the cause for petitioner. With him on the briefs was *Steven D. Atkinson*.

Wayne Jett argued the cause for respondents. With him on the brief was *Julius Reich*.*

**Richard P. Markey* filed a brief for Associated Builders and Contractors Inc. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Lee, Deputy Solicitor General Wallace, Barbara E. Etkind*, and *T. Timothy Ryan, Jr.*, for the United States; by *J. Albert Woll, Laurence J. Cohen, Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Denis F. Gordon* for the National Coordinating Committee for Multiemployer Plans; by *John H. Stephens, George M. Cox*, and *Michael Futch* for the Carpenters

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve conflicts in the Circuits as to whether monetary obligations that have accrued under a prehire contract authorized by § 8(f) of the National Labor Relations Act, 73 Stat. 545, 29 U. S. C. § 158(f), can be enforced, prior to the repudiation of such a contract, in a suit brought by a union against an employer under § 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185, absent proof that the union represented a majority of the employees.

I

Petitioner is engaged in the construction industry and, in September 1978, was a subcontractor on a jobsite in southern California. The general contractor was contractually bound to the Master Labor Agreement negotiated between the International Union of Operating Engineers, Local No. 12, and the Southern California General Contractors Associations. The Master Labor Agreement provided that work at the jobsite was to be performed only by subcontractors who had signed a labor agreement with the Union.[1] The Master Labor Agreement also contained a union security clause requiring covered employees, including those of subcontrac-

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Trust Funds for Southern California et al.; and by *Daniel L. Stewart* for the Loyola of Los Angeles Law Review.

[1] Article IV, § D, of the agreement provides:

"The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." App. 39.

tors, to become members of the Union.[2] At the time petitioner began work on the jobsite as a subcontractor, it was not a signatory to a labor agreement with the Union and none of its employees on the jobsite were members of the Union.

On September 13, 1978, petitioner's president, McNeff, was approached on the jobsite by a representative of the Union who informed him that in order to remain on the project he was required to sign the Master Labor Agreement. McNeff refused. Later that day, the Union representative returned with a representative of the general contractor who also informed McNeff that he was required to sign the agreement in order to remain on the project. McNeff then signed the agreement on behalf of petitioner.[3] Petitioner's employees signed union cards that same day.

The Master Labor Agreement required petitioner to make monthly contributions to fringe benefit trust funds on behalf of each covered employee.[4] From October 1978 through

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[2] Article II, §§ D and E, of the agreement provide:

"D. Employees employed by one or more of the Contractors for a period of eight (8) days continuously or accumulatively under the work jurisdiction of a particular Union as that term is defined herein shall be or become on the eighth (8th) day or eight (8) days after the effective date of this Agreement, whichever is later, members of such Union and shall remain members of such Union as a condition of continued employment. Membership in such Union shall be available upon terms and qualifications not more burdensome than those applicable at such times to other applicants for membership to such Union.

"E. The Contractor shall discharge any employee pursuant to the foregoing section upon written notice from the Union of such employee's nonpayment of initiation fees or dues." App. 38.

[3] Specifically, petitioner entered into an agreement that adopted the Master Labor Agreement "in its entirety," with certain exceptions that are not relevant to this case. *Id.*, at 9–13.

[4] The agreement provides:

"The undersigned employer by his signature acknowledges receipt of a true and correct copy of the Agreement establishing the Operating Engineers Trusts:

"AND, further by his signature, accepts all of the terms and conditions of said Trust Agreements and agrees to be bound thereto in every way, March 1979 petitioner submitted required monthly reports to the trust funds, but made no contributions. Each form was submitted by petitioner with the false notation that "no members of this craft were employed during this month." In November 1978, after petitioner had filed the first of such reports, respondents, the trustees of the funds, requested permission from petitioner to audit its records to verify the statements made in its monthly report. Petitioner purported to agree, but postponed the audit several times. On April 4, 1979, respondents brought this suit under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185,[5] to compel an accounting and payment of any contributions found to be due the trust funds. An audit performed in pretrial discovery proceedings revealed that petitioner had five employees covered by the agreement during the period October 1978 through March 1979 and therefore owed a total of $5,316.79 in trust fund contributions for that period.

The District Court for the Central District of California granted respondents' motion for summary judgment and ordered payment of the unpaid trust fund contributions. The Court of Appeals for the Ninth Circuit affirmed. 667 F. 2d 800 (1982).

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including the obligation to make periodic contributions and payments pursuant to the requirement of the Board of Trustees consistent with said Trust Agreements and the Collective Bargaining Agreement between said employer and Local 12, International Union of Operating Engineers." *Id.*, at 12–13.

The record shows that McNeff initialed petitioner's acceptance of the following trust fund obligations: (1) pension trust; (2) health and welfare trust; (3) vacation-holiday trust; (4) apprentice trust; (5) journeyman training trust; and (6) industry fund trust. *Id.*, at 13.

[5] Section 301(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156.

We granted certiorari, 458 U. S. 1120 (1982), in part to resolve Circuit conflicts on this issue,[6] and we affirm.

II

By authorizing so-called "prehire" agreements like that at issue in this case, § 8(f) of the National Labor Relations Act, 29 U. S. C. § 158(f), exempts construction industry employers and unions from the general rule precluding a union and an employer from signing "a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *NLRB* v. *Iron Workers*, 434 U. S. 335, 344–345 (1978) *(Higdon)*. See *Garment Workers* v. *NLRB*, 366 U. S. 731, 737–738 (1961). Section 8(f) provides in pertinent part:

> "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . : *Provided* . . . That any agreement

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[6] Compare *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co. of Metropolitan Washington*, 220 U. S. App. D. C. 273, 681 F. 2d 1 (1982); 667 F. 2d 800 (CA9 1982) (case below); *W. C. James, Inc.* v. *Oil, Chemical & Atomic Workers International Union*, 646 F. 2d 1292 (CA8 1981); *New Mexico District Council of Carpenters* v. *Mayhew Co.*, 664 F. 2d 215 (CA10 1981); and *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan* v. *Associated Wrecking Co.*, 638 F. 2d 1128 (CA8 1981), with *Laborers District Council of Alabama* v. *McDowell Contractors, Inc.*, 680 F. 2d 94 (CA11 1982), and *Baton Rouge Building & Construction Trades Council* v. *E. C. Schafer Construction Co.*, 657 F. 2d 806 (CA5 1981).

> which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." 73 Stat. 545.

Thus, § 8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner provided for under § 9 of the Act. One factor prompting Congress to enact § 8(f) was the uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry. Congress recognized that construction industry unions often would not be able to establish majority support with respect to many bargaining units. See S. Rep. No. 187, 86th Cong., 1st Sess., 55–56 (1959), 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 451–452 (Leg. Hist.). Congress was also cognizant of the construction industry employer's need to "know his labor costs before making the estimate upon which his bid will be based" and that "the employer must be able to have available a supply of skilled craftsmen for quick referral." H. R. Rep. No. 741, 86th Cong., 1st Sess., 19 (1959), 1 Leg. Hist. 777. See generally, *Higdon*, *supra*, at 348–349.

We first addressed the enforceability of a § 8(f) prehire agreement in *Higdon*. In response to the employer's violation of a prehire agreement, the minority union in that case picketed the employer for more than 30 days without filing an election petition. The National Labor Relations Board concluded that such picketing violated § 8(b)(7)(C). Section 8(b)(7)(C) was intended to ensure voluntary, uncoerced selection of a bargaining representative by employees; unless a union is the certified representative of the employees in the relevant unit, it prohibits picketing to force an employer "to recognize or bargain with a labor organization as the representative of his employees." In *Higdon*, we affirmed the Board's view that a prehire agreement does not make a union the "representative of [an employer's] employees" as that language is used in § 8(b)(7)(C):

> "[Absent] majority credentials . . . , the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured. Picketing to enforce the § 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent, and § 8(b)(7)(C) was infringed when the union failed to request an election within 30 days." 434 U. S., at 346.

III

We did not decide in *Higdon* whether prehire agreements are enforceable in a § 301 action. There is a critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract. Only the former obligation was treated in *Higdon.*[7]

In upholding the Board's view that a union commits an unfair labor practice by picketing to enforce a prehire agreement before it has attained majority status, we noted in

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[7] In *Higdon,* we addressed the question whether holding a prehire contract to be unenforceable in a § 301 suit would be contrary to *Retail Clerks* v. *Lion Dry Goods, Inc.,* 369 U. S. 17 (1962). In *Lion Dry Goods* the Court stated that § 301(a) confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as suits on contracts between an employer and actual collective-bargaining agents. Section 8(f) contracts were noted as being within a federal court's § 301(a) jurisdiction. *Id.,* at 29. In *Higdon,* we merely noted that "[i]t would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract . . . and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." 434 U. S., at 351–352. This statement was intended to show that the question of jurisdiction under § 301 is different from the question of enforceability of a prehire agreement in a § 301 action. We did not decide the latter question.

Higdon that this view protects two interests that Congress intended to uphold when it enacted § 8(f). First, our holding in *Higdon* protects the § 7 rights of employees to select their own bargaining representative.[8] To be sure, § 8(f) affects the § 7 rights of employees by allowing a minority union to reach an agreement with the employer setting the terms and conditions of employment. This is the direct and intended consequence of § 8(f) and, in any event, is limited by the final proviso in § 8(f) that permits employees—and other parties mentioned in §§ 9(c) and (e) of the Act—to challenge a prehire agreement at any time by petitioning the Board for a representative election. If, however, an employer could be compelled by picketing to treat a minority union as the exclusive bargaining agent of employees, the § 7 rights of those employees would be undermined to an extent not contemplated by Congress. As we noted in *Higdon*, 434 U. S., at 338, a union that is the certified representative of the employees in the relevant unit does not commit an unfair labor practice under § 8(b)(7)(C) by picketing to compel compliance with a collective-bargaining agreement. Consequently, freeing a minority union from the confines of § 8(b)(7)(C) would grant that union power otherwise accorded only to certified bargaining representatives chosen by a majority of the affected employees. It is up to those employees to decide what organization, if any, will enter into a collective-bargaining agreement on their behalf and have the consequent right to engage in picketing, if necessary, to enforce it; the union signatory to a prehire agreement cannot arrogate such power to itself until it "successfully seeks majority support." *Higdon, supra,* at 350.

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[8] Section 7 of the Act, 29 U. S. C. § 157, guarantees employees the right to bargain collectively through representatives of their own choosing. Section 9(a) of the Act, 29 U. S. C. § 159(a), provides that the bargaining agent for all employees in the appropriate unit must be the representative "designated or selected for the purposes of collective bargaining by the majority of the employees . . . ." It is an unfair labor practice for an employer under §§ 8(a)(1) and (2) and for a union under § 8(b)(1)(A) to interfere with, restrain, or coerce employees in the exercise of their right to select their representative. See generally *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961).

Second, our decision in *Higdon* promotes Congress' "intention . . . that prehire agreements were to be arrived at voluntarily . . . ." *Higdon,* 434 U. S., at 348, n. 10. In accord with this intention, we approved the Board's conclusion that a "prehire agreement is voidable" "until and unless [the union] attains majority support in the relevant unit." *Id.,* at 341. Allowing the union to picket to enforce a prehire agreement before it attains majority status is plainly inconsistent with the voidable nature of a prehire agreement.

The concerns with the § 7 rights of employees to select their own bargaining representative and our fidelity to Congress' intent that prehire agreements be voluntary—and voidable—that led to our decision in *Higdon* are not present in this case. Union enforcement, by way of a § 301 suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent. Unlike the situation in *Higdon,* enforcement of accrued obligations in a § 301 suit does not mean that the union represents a majority of the employer's employees. In a § 301 suit, the District Court merely enforces a contract entered into by the employer—a contract that Congress has legitimated to meet a special situation even though employees themselves have no part in its negotiation or execution. Such enforcement does not grant the plaintiff union a right otherwise enjoyed only by a majority union except in the very narrow sense, expressly intended by Congress, that employers and minority unions in the construction industry do not violate the Act by entering into prehire agreements. There is no sense in which respondents' contract action has a recognitional purpose like that forbidden in *Higdon.*

Neither does respondents' § 301 action trench on the voluntary and voidable characteristics of a § 8(f) prehire agreement. It is clear in this case that petitioner entered into the prehire agreement voluntarily.[9] Moreover, although the voidable nature of prehire agreements clearly gave petitioner the right to repudiate the contract, it is equally clear that petitioner never manifested an intention to void or repudiate the contract. For the relevant period of time,[10] the record shows conclusively that petitioner accepted the benefits of the prehire agreement and misled the union of its true intention never to fulfill its contractual obligations. Whatever may be required of a party wishing to exercise its undoubted right to repudiate a prehire agreement before the union attains majority support in the relevant unit, no appropriate action was taken by petitioner to do so in this case.[11] Consequently, respondents' suit does not enervate the voluntary and voidable characteristics of the prehire agreement.

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[9] There is no merit to petitioner's claim that it was coerced into entering the agreement. Petitioner was simply informed that the general contractor on the jobsite was bound by a union signatory subcontracting clause in its collective-bargaining agreement with the Union. That clause required petitioner to enter into a similar agreement with the Union if it wanted to stay on the jobsite. Such clauses are lawful under the construction industry proviso of § 8(e) of the Act, 29 U. S. C. § 158(e). As we said in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645 (1982), whatever pressures petitioner complains of as a result of the union signatory subcontracting clause are "implicit in the construction industry proviso." *Id.*, at 663. Petitioner cannot rely on such "pressure," made lawful by the construction industry proviso, to support its contention that it entered the prehire agreement at issue in this case involuntarily.

[10] The only time period relevant to this case is that between September 13, 1978 (the date the prehire agreement was entered into), and April 26, 1979 (the date respondents' § 301 suit was filed). The District Court entered judgment for respondents for the trust fund obligations incurred by petitioner for this period of time only. App. to Pet. for Cert. 10–11. Respondents did not appeal the amount of their recovery.

[11] It is not necessary to decide in this case what specific acts would effect the repudiation of a prehire agreement—sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation elec-

Apart from not offending the concerns noted in *Higdon*, allowing a minority union to enforce overdue obligations accrued under a prehire agreement prior to its repudiation vindicates the policies Congress intended to implement in § 8(f). Congress clearly determined that prehire contracts should be lawful to meet problems unique to the construction industry. However limited the binding effect of a prehire agreement may be, it strains both logic and equity to argue that a party to such an agreement can reap its benefits and then avoid paying the bargained-for consideration. Nothing in the legislative history of § 8(f) indicates Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall.[12] Having had the music, he must pay the piper.

By the same token, the union cannot simply accept the employer's performance under a prehire contract without upholding its end of the bargain. Neither party is compelled to enter into a § 8(f) agreement. But when such an agreement is voluntarily executed, both parties must abide by its terms until it is repudiated.[13]

IV

A § 8(f) prehire agreement is subject to repudiation until the union establishes majority status. However, the monetary obligations assumed by an employer under a prehire

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tion pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support.

[12] Petitioner received another benefit not expressly contemplated by Congress. Here, the Union had a collective-bargaining agreement with the general contractor requiring that work at the jobsite was to be performed only by subcontractors who had signed an agreement with the Union. See n. 1, *supra*. Thus, the direct consequence of petitioner's entering into the prehire agreement was to enable petitioner to remain on the job.

[13] We need not consider in this case whether considerations properly cognizable by a court under § 301 might prevent either party, in particular circumstances, from exercising its option under § 8(f) to repudiate a prehire agreement before the union demonstrates majority status.

contract may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support in the relevant unit. There having been no repudiation in this case, the judgment of the Court of Appeals is

Affirmed.

BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81–2337. Argued February 23, 1983—Decided May 2, 1983*

North Dakota filed suit in Federal District Court against several federal officials to resolve a dispute as to ownership of certain portions of a riverbed within the State. The United States claims title to most of the disputed area on the basis of its status as a riparian landowner on a nonnavigable river, while the State asserts that the river was navigable when North Dakota was admitted to the Union in 1889 and thus it owns the riverbed under the equal-footing doctrine. In addition to seeking injunctive, declaratory, and mandamus relief under various federal statutes, North Dakota asserted a claim under the Quiet Title Act of 1972 (QTA), by which the United States, subject to certain exceptions, has waived its sovereign immunity and has permitted plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes involving real property. After trial, the court entered judgment for the State, holding that the QTA's 12-year statute of limitations, 28 U. S. C. § 2409a(f), does not apply where the plaintiff is a State. The Court of Appeals affirmed.

Held:

1. The legislative history establishes that Congress intended the QTA to provide the exclusive means by which adverse claimants can challenge the United States' title to real property. Thus there is no merit to North Dakota's contention that even if suit under the QTA is time-barred under § 2409a(f), the judgment below is still correct because the suit is maintainable as an "officer's suit" for injunctive or mandamus relief against the federal officials charged with supervision of the disputed area. The rule that a precisely drawn, detailed statute pre-empts more general remedies is applicable here. Cf. *Brown* v. *GSA*, 425 U. S. 820. Pp. 280–286.

2. The limitations provision in § 2409a(f) is as fully applicable to a State as it is to all others who sue under the QTA. When Congress at-

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*Together with No. 82–132, *North Dakota ex rel. Board of University and School Lands* v. *Block, Secretary of Agriculture, et al.*, also on certiorari to the same court.

taches conditions, such as a statute of limitations, to legislation waiving the United States' sovereign immunity, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied. Section 2409a(f) expressly states that *any* civil action is time-barred unless filed within 12 years after the date it accrued. Even assuming that the canon of statutory construction that a sovereign is normally exempt from the operation of a generally worded statute of limitations in the absence of express contrary intent has relevance in construing the applicability to the States of a congressionally imposed statute of limitations not expressly including the States, here the legislative history shows that Congress did not intend to exempt the States from compliance with § 2409a(f). Pp. 286–290.

3. Nor is § 2409a(f) invalid under the equal-footing doctrine and the Tenth Amendment, as North Dakota asserts. A federal law depriving a State of land vested in it by the Constitution would not be invalid on such grounds, but would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment. Section 2409a(f), however, does not purport to strip anyone of any property or to effectuate a transfer of title. A dismissal pursuant to the statute does not quiet title to the disputed land in the United States; the title dispute remains unresolved. Thus there is no constitutional infirmity in § 2409a(f). Pp. 291–292.

4. If North Dakota's suit is barred by § 2409a(f), the courts below had no jurisdiction to inquire into the merits. Since the lower courts made no findings as to the date on which North Dakota's suit accrued for purposes of the statute, the cases must be remanded for further proceedings. Pp. 292–293.

671 F. 2d 271, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 293.

Deputy Solicitor General Claiborne argued the cause for petitioners in No. 81–2337. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Jacques B. Gelin*, and *Edward J. Shawaker*.

Robert O. Wefald, Attorney General of North Dakota, argued the cause for respondents in No. 81–2337. With him on the brief was *Owen L. Anderson*.†

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†Briefs of *amici curiae* urging affirmance were filed for the State of Colorado by *J. D. MacFarlane*, Attorney General, *Charles G. Howe*, Dep-

JUSTICE WHITE delivered the opinion of the Court.

Under the Quiet Title Act of 1972 (QTA),[1] the United States, subject to certain exceptions, has waived its sover-

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uty Attorney General, *Joel W. Cantrick*, Solicitor General, *Janet L. Miller*, First Assistant Attorney General, and *Kathleen M. Bowers*, Assistant Attorney General; and for the State of California et al. by *George Deukmejian*, Attorney General of California, *N. Gregory Taylor*, Assistant Attorney General, *Dennis M. Eagan*, *Bruce S. Flushman*, and *Joseph Barbieri*, Deputy Attorneys General; *Charles A. Graddick*, Attorney General of Alabama; *Norman C. Gorsuch*, Attorney General of Alaska, and *Michael W. Sewright*, Assistant Attorney General; *Robert K. Corbin*, Attorney General of Arizona, and *Anthony Ching*, Solicitor General; *John Steven Clark*, Attorney General of Arkansas; *Richard S. Gebelein*, Attorney General of Delaware, and *J. Calvin Williams*, Deputy Attorney General; *Jim Smith*, Attorney General of Florida; *Michael J. Bowers*, Attorney General of Georgia; *Tany S. Hong*, Attorney General of Hawaii; *David H. Leroy*, Attorney General of Idaho; *Tyrone C. Fahner*, Attorney General of Illinois; *Thomas J. Miller*, Attorney General of Iowa; *William J. Guste, Jr.*, Attorney General of Louisiana, and *Gary L. Keyser*, Assistant Attorney General; *Frank J. Kelley*, Attorney General of Michigan, and *Louis J. Caruso*, Solicitor General; *Warren Spannaus*, Attorney General of Minnesota; *Michael T. Greely*, Attorney General of Montana; *Richard H. Bryan*, Attorney General of Nevada; *Irwin I. Kimmelman*, Attorney General of New Jersey; *Robert Abrams*, Attorney General of New York; *Jan Eric Cartwright*, Attorney General of Oklahoma; *Dave Frohnmayer*, Attorney General of Oregon; *LeRoy S. Zimmerman*, Attorney General of Pennsylvania; *Dennis J. Roberts II*, Attorney General of Rhode Island; *Daniel R. McLeod*, Attorney General of South Carolina; *Mark V. Meierhenry*, Attorney General of South Dakota, and *Roxanne Giedd*, Assistant Attorney General; *John J. Easton, Jr.*, Attorney General of Vermont, and *John H. Chase*, Assistant Attorney General; *Kenneth O. Eikenberry*, Attorney General of Washington; and *A. G. McClintock*, Attorney General of Wyoming.

[1] Act of Oct. 25, 1972, Pub. L. 92–562, 86 Stat. 1176, codified at 28 U. S. C. § 2409a, 28 U. S. C. § 1346(f), and 28 U. S. C. § 1402(d).

The provision relevant to the present case, 28 U. S. C. § 2409a, states:

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have eign immunity and has permitted plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest. These cases present two separate issues concerning the QTA. The first is whether Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real

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been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U. S. C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U. S. C. 666).

"(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

"(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

"(e) A civil action against the United States under this section shall be tried by the court without a jury.

"(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

"(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession."

property. The second is whether the QTA's 12-year statute of limitations, 28 U. S. C. § 2409a(f), is applicable in instances where the plaintiff is a State, such as respondent North Dakota. We conclude that the QTA forecloses the other bases for relief urged by the State, and that the limitations provision is as fully applicable to North Dakota as it is to all others who sue under the QTA.

I

It is undisputed that under the equal-footing doctrine first set forth in *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), North Dakota, like other States, became the owner of the beds of navigable streams in the State upon its admission to the Union. It is also agreed that under the law of North Dakota, a riparian owner has title to the center of the bed of a nonnavigable stream. See N. D. Cent. Code § 47-01-15 (1978); *Amoco Oil Co.* v. *State Highway Dept.*, 262 N. W. 2d 726, 728 (N. D. 1978). Because of differing views of navigability, the United States and North Dakota assert competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota. The United States contends that the river is not now and never has been navigable, and it claims most of the disputed area based on its status as riparian landowner.[2] North Dakota, on the other hand, asserts that the river was navigable on October 1, 1889, the date North Dakota attained statehood, and therefore that title to the disputed bed vested in it under the equal-footing doctrine on that date. Since at least 1955, the United States has been issuing riverbed oil and gas leases to private entities.

Seeking to resolve this dispute as to ownership of the riverbed, North Dakota filed this suit in the District Court against several federal officials.[3] The State's complaint requested injunctive and mandamus relief directing the defendants to "cease and desist from develop[ing] or otherwise exercising privileges of ownership upon the bed of the Little Missouri River within the State of North Dakota," and it further sought a declaratory judgment "[d]eclaring the Little Missouri River to be a navigable river for the purpose of determining ownership of the bed." App. 9. As the jurisdictional basis for its suit, North Dakota invoked 28 U. S. C. § 1331 (federal question); 28 U. S. C. § 1361 (mandamus); 28 U. S. C. §§ 2201–2202 (declaratory judgment and further relief); and 5 U. S. C. §§ 701–706 (the judicial review provisions of the Administrative Procedure Act). App. 6. North Dakota's original complaint did not mention the QTA. However, the District Court required the State to amend its complaint to recite a claim thereunder. App. to Pet. for Cert. in No. 81–2337, pp. A–14—A–16. The State complied and filed an amended complaint. App. 13–16.[4]

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[2] In some parts of the disputed area, the United States' claim to the bed is founded on reasons other than its status as riparian landowner. See Tr. 38-48.

The matter thereafter proceeded to trial. North Dakota introduced evidence in support of its claim that the river was navigable on the date of statehood.[5] The federal defendants, while denying navigability, presented no evidence on this point;[6] their evidence was limited to showing, for statute of limitations purposes, that the State had notice of the United States' claim more than 12 years prior to the commencement of the suit.

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[3] The complaint named as defendants the Secretary of the Interior, the Secretary of Agriculture, the Director of the United States Bureau of Land Management, and the Chief of the United States Forest Service. App. 6. The defendants were alleged to have "final authority" over the agencies that were "presently unlawfully asserting ownership over sovereign lands of the State of North Dakota." *Id.*, at 7.

[4] North Dakota's amended complaint did not name the United States as a party defendant, even though the United States appears to be the only proper federal defendant under 28 U. S. C. § 2409a(a). The Solicitor General has expressly waived any objection the United States or the defendants might have as to this point. Brief for Petitioners in No. 81–2337, p. 31, n. 20.

[5] North Dakota's case consisted of documentary evidence of canoe travel on the river prior to statehood, an effort to float logs down the river shortly after statehood, present-day recreational canoe traffic, and other small craft usage over the years.

After trial, the District Court rendered judgment for North Dakota. The court first concluded that the Little Missouri River was navigable in 1889 and that North Dakota attained title to the bed at statehood under the equal-footing doctrine and the Submerged Lands Act of 1953, 43 U. S. C. §1311(a). 506 F. Supp. 619, 622–624 (ND 1981). Then, applying what it deemed to be an accepted rule of construction that statutes of limitations do not apply to sovereigns unless a contrary legislative intention is clearly evident from the express language of the statute or otherwise, the court rejected the defendants' claim that North Dakota's suit was barred by the QTA's 12-year statute of limitations, 28 U. S. C. §2409a(f). 506 F. Supp., at 625–626.[7] The District Court accordingly entered judgment quieting North Dakota's title to the bed of the river. App. to Pet. for Cert. in No. 81–2337, pp. A–29—A–30.[8] The Court of Appeals affirmed in all respects. 671 F. 2d 271 (CA8 1982).

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[6] The federal defendants took the position that the State's evidence of navigability was so weak that it actually supported the view that the river was nonnavigable.

[7] To further support this conclusion, the court stated, albeit without elaboration, that the legislative history of the QTA showed that Congress intended the statute of limitations "to apply exclusively to persons, be they private citizens or private or public corporations." 506 F. Supp., at 625. The court also commented that the federal defendants' position was contrary to the express will of Congress, as indicated by the Submerged Lands Act, 43 U. S. C. § 1311(a). 506 F. Supp., at 626.

The defendants also argued in the District Court that the United States had acquired title to the bed by adverse possession, and that, in any event, the suit was barred by laches. The District Court rejected both of these contentions, *id.*, at 624–626, and the defendants did not pursue them further.

[8] The judgment excluded those portions of the bed in which the Three Affiliated Tribes of the Fort Berthold Reservation had an interest. The

The defendants' petition for certiorari, which we granted, 459 U. S. 820 (1982), challenged only the Court of Appeals' conclusion that the QTA's statute of limitations is inapplicable to States. North Dakota filed a conditional cross-petition, No. 82–132, asserting that even if its suit under the QTA is barred by § 2409a(f), the judgment below is still correct because the QTA remedy is not exclusive and its suit against the federal officers is still maintainable wholly aside from the QTA. This submission, which the Court of Appeals did not find it necessary to address, is also urged by the State, as respondent in No. 81–2337, as a ground for affirming the judgment in its favor. See *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419 (1977). We now grant the cross-petition, which heretofore has remained pending, and we first address the question presented by it.

II

The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress. *California* v. *Arizona*, 440 U. S. 59, 61–62 (1979); *Minnesota* v. *United States*, 305 U. S. 382, 387 (1939); *Kansas* v. *United States*, 204 U. S. 331, 342 (1907). Only upon passage of the QTA did the United States waive its immunity with respect to suits involving title to land. Prior to 1972, States and all others asserting title to land claimed by the United States had only limited means of obtaining a resolution of the title dispute—they could attempt to induce the United States to file a quiet title action against them, or they could petition Congress or the Executive for discretionary relief. Also, since passage of the Tucker Act in 1887, those claimants willing to settle for monetary damages rather than

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Tribes were not named as parties to the State's suit, and the court concluded that their rights should be left unaffected by the judgment. *Id.*, at 622.

title to the disputed land could sue in the Court of Claims and attempt to make out a constitutional claim for just compensation. See 28 U. S. C. § 1491; *Malone* v. *Bowdoin*, 369 U. S. 643, 647, n. 8 (1962).

Enterprising claimants also pressed the so-called "officer's suit" as another possible means of obtaining relief in a title dispute with the Federal Government. In the typical officer's suit involving a title dispute, the claimant would proceed against the federal officials charged with supervision of the disputed area, rather than against the United States. The suit would be in ejectment or, as here, for an injunction or a writ of mandamus forbidding the defendant officials to interfere with the claimant's property rights.

As a device for circumventing federal sovereign immunity in land title disputes, the officer's suit ultimately did not prove to be successful. This Court appeared to accept the device in early cases. See *United States* v *Lee*, 106 U. S. 196 (1882); *Meigs* v. *M'Clung's Lessee*, 9 Cranch 11 (1815). Later cases, however, were inconsistent; some held that such suits were barred by sovereign immunity, while others did not, and "it is fair to say that to reconcile completely all the decisions of the Court in this field . . . would be a Procrustean task." *Malone* v. *Bowdoin*, *supra*, at 646. Compare, *e. g.*, the cases cited 369 U. S., at 646, n. 6, with those cited *id.*, at 646, n. 7.

In *Malone*, the Court cut through the tangle of the previous decisions and applied to land disputes the rule announced in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682 (1949):

> "[T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'" *Malone*, *supra*, at 647 (quoting *Larson*, *supra*, at 702).

The *Larson-Malone* test plainly made it more difficult for a plaintiff to employ a suit against federal officers as a vehicle for resolving a title dispute with the United States. Thus, in the decade after *Malone*, claimants having disputes with the United States over real property met with little success in most courts.[9]

Against this background, Congress considered and passed the QTA in 1972. At a hearing on the bill, the officer's-suit possibility was called to the attention of Congress.[10] The predominant view, however, was that citizens asserting title to or the right to possession of lands claimed by the United States were "without benefit of a recourse to the courts," because of the doctrine of sovereign immunity.[11]

Congress sought to rectify this state of affairs. The original version of S. 216, the bill that became the QTA, was short and simple. Its substantive provision provided for no qualifications whatsoever. It stated in its entirety: "The United States may be named a party in any civil action brought by any person to quiet title to lands claimed by the United States." 117 Cong. Rec. 46380 (1971). The Executive Branch opposed the original version of S. 216 and proposed, in its stead, a more elaborate bill, reprinted in S. Rep. No. 92–575, pp. 7–8 (1971), providing several "appropriate safeguards for the protection of the public interest."[12]

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[9] See, *e. g.*, *County of Bonner* v. *Anderson*, 439 F. 2d 764 (CA9 1971); *Simons* v. *Vinson*, 394 F. 2d 732 (CA5), cert. denied, 393 U. S. 968 (1968); *Gardner* v. *Harris*, 391 F. 2d 885 (CA5 1968); *Switzerland Co.* v. *Udall*, 337 F. 2d 56 (CA4 1964), cert. denied, 380 U. S. 914 (1965). One Court of Appeals, however, construed *Malone* narrowly. See *Armstrong* v. *Udall*, 435 F. 2d 38, 42 (CA9 1970); *Andros* v. *Rupp*, 433 F. 2d 70, 73–74 (CA9 1970) (holding *Malone* to be inapplicable where the plaintiff has record title to the disputed land).

[10] See Hearing on S. 216 et al. before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 64 (1971) (statement of Prof. J. Steadman); *id.*, at 81 (letter from L. Gendron, Esq.).

[11] S. Rep. No. 92–575, p. 1 (1971). See also H. R. Rep. No. 92–1559, p. 6 (1972); *id.*, at 9 (letter from the Attorney General); Hearing, *supra* n. 10, at 8 (Sen. Church); *id.*, at 2, 19 (M. Melich, Solicitor, Dept. of the Interior); *id.*, at 45 (letter from Sen. Hansen); *id.*, at 55 (T. McKnight); *id.*, at 74 (letter from R. Reynolds); *id.*, at 77 (statement of T. Cavanaugh).

This Executive proposal, made by the Justice Department, limited the waiver of sovereign immunity in several important respects. First, it excluded Indian lands from the scope of the waiver. The Executive Branch felt that a waiver of immunity in this area would not be consistent with "specific commitments" it had made to the Indians through treaties and other agreements.[13] Second, in order to insure that the waiver would not "serve to disrupt costly ongoing Federal programs that involve the disputed lands," the proposal allowed the United States the option of paying money damages instead of surrendering the property if it lost a case on the merits.[14] Third, the Justice Department proposal provided that the legislation would have prospective effect only; that is, it would not apply to claims that accrued prior to the date of enactment. This was deemed necessary so that the workload of the Justice Department and the courts could develop at a rate which could be absorbed.[15] Fourth, to insure that stale claims would not be opened up to litigation,[16] the proposed bill included a 6-year statute of limitations.[17]

The Senate accepted the Justice Department's proposal, with the notable exception of the provision that would have given the bill prospective effect only. The Senate-passed version of the bill contained a "grandfather clause" that would have allowed old claims to be asserted for two years after the bill became law.[18]

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[12] Hearing, *supra* n. 10, at 21 (S. Kashiwa, Assistant Attorney General); see *id.*, at 32 (J. McGuire, Dept. of Agriculture).

[13] *Id.*, at 2, 19 (M. Melich, Solicitor, Dept. of the Interior).

[14] *Ibid.* See also *id.*, at 3, 32 (views of Dept. of Agriculture); S. Rep. No. 92–575, pp. 5–6 (1971) (letter from the Attorney General).

[15] *Id.*, at 7 (letter from the Attorney General).

[16] H. R. Rep. No. 92–1559, p. 7 (1972) (letter from the Deputy Attorney General).

[17] The Justice Department proposal contained other, relatively minor limitations on the waiver. For example, it expressly stated that no one could claim against the United States by adverse possession, and it provided for exclusive federal jurisdiction. All of these changes were ultimately included in the legislation.

Primarily because of the grandfather clause, the Executive Branch could still not accept the bill. The Department of Justice argued that this clause could cause "a flood of litigation on old claims, many of which had already been submitted to the Congress and rejected," thereby putting "an undue burden on the Department and the courts."[19] As a compromise, the Department proposed to give up its insistence on "prospective only" language and to accept an increase in the statute of limitations to 12 years, in exchange for elimination of the grandfather clause.[20] This proposal had the effect of making the bill retroactive for a 12-year period. The House included this compromise in the version of the bill passed by it, and the Senate acquiesced and the bill became law with the compromise language intact.

In light of this legislative history, we need not be detained long by North Dakota's contention that it can avoid the QTA's statute of limitations and other restrictions by the device of an officer's suit. If North Dakota's position were correct, all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown* v. *GSA*, 425 U. S. 820, 833 (1976).

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[18] This provision stated that an action would be barred unless an action was begun "within six years after the claim for relief first accrues *or within two years after the effective date of this Act*, whichever is later." 117 Cong. Rec. 46380 (1971) (emphasis added).

[19] H. R. Rep. No. 92–1559, p. 7 (1972) (letter from the Deputy Attorney General).

[20] *Id.*, at 7–8. The Department of Justice also objected to a provision in the Senate-passed version that would have made the limitations period begin to run only on the date that the plaintiff obtained actual knowledge of the United States' claim. The Department contended that the limitations period should begin to run on the date the claimant knew or should have known of the United States' claim, see *ibid.*, and Congress agreed to this change.

If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory. The United States could also be dispossessed of the disputed property without being afforded the option of paying damages, thereby thwarting the congressional intent to avoid disruptions of costly federal activities. Finally, and most relevant to the present cases, the QTA's 12-year statute of limitations, the one point on which the Executive Branch was most insistent, could be avoided, and, contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted.

Brown v. *GSA*, *supra*, is instructive here. In that case, we held that § 717 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–16, was the exclusive remedy for federal employment discrimination. There, as here, it was "problematic" whether any judicial relief at all was available prior to passage of the Act; the prevailing congressional view was that there was none. 425 U. S., at 826–828. There, as here, the "balance, completeness, and structural integrity" of the statute belied the contention that it "was designed merely to supplement other putative judicial relief." *Id.*, at 832. Thus, we applied the rule that a precisely drawn, detailed statute pre-empts more general remedies. *Id.*, at 834.[21] That rule is equally applicable in the present context.

Accordingly, we need not reach the question whether, prior to 1972, *Larson* v. *Domestic & Foreign Corp.*, 337

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[21] See also *Great American Federal Savings & Loan Assn.* v. *Novotny*, 442 U. S. 366, 375–377 (1979); *Preiser* v. *Rodriguez*, 411 U. S. 475, 488–490 (1973); *United States* v. *Demko*, 385 U. S. 149, 151–152 (1966); 1A C. Sands, Statutes and Statutory Construction § 23.16 (4th ed. 1972).

U. S. 682 (1949), and *Malone* v. *Bowdoin*, 369 U. S. 643 (1962), would have permitted an officer's suit to be maintained under the present circumstances.[22] We hold that Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property.[23]

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[22] We also reject North Dakota's claim that, even if the QTA pre-empted alternative remedies in 1972, Congress created a new supplemental remedy four years later when it amended 5 U. S. C. § 702 with Pub. L. 94-574, 90 Stat. 2721. That statute waived federal sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages, but it specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The QTA is such an "other statute," because, if a suit is untimely under the QTA, the QTA expressly "forbids the relief" which would be sought under § 702. See H. R. Rep. No. 94-1656, p. 13 (1976) (§ 702 provides no authority to grant relief "when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy").

[23] The legislative history is clear that Congress intended to foreclose totally any suit on claims that accrued more than 12 years prior to the effective date of the QTA. The Constitution, however, requires that statutes of limitations must "'allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.'" *Texaco, Inc.* v. *Short*, 454 U. S. 516, 527, n. 21 (1982) (quoting *Wilson* v. *Iseminger*, 185 U. S. 55, 62-63 (1902)). Therefore, *if* an "officer's suit" was available prior to 1972, and *if* the laches or limitations period for such a suit was longer than 12 years (and we express no opinion on either of these points), § 2409a(f) arguably was unconstitutional to the extent it extinguished claims that could have been brought at the time of its passage. See *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 96, 102 (1906); *Sohn* v. *Waterson*, 17 Wall. 596, 599 (1873). North Dakota has not raised this issue, and it could not do so successfully, because, although the QTA was passed in 1972, the State did not bring this suit until 1978. However long the "reasonable time" period must be, it clearly need not be six years. Hence, even if North Dakota had a constitutional right to bring its suit within a short time after enactment of the QTA, it could not do so six years later solely by virtue of the QTA's failure to provide for the requisite "reasonable time."

III

We also cannot agree with North Dakota's submission, which was accepted by the District Court and the Court of Appeals, that the States are not subject to the operation of §2409a(f). This issue is purely one of statutory interpretation, and we find no support for North Dakota's position in either the plain statutory language or the legislative history. The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied. See, *e. g., Lehman* v. *Nakshian*, 453 U. S. 156, 160–161 (1981); *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979); *Honda* v. *Clark*, 386 U. S. 484, 501 (1967); *Soriano* v. *United States*, 352 U. S. 270 (1957); *United States* v. *Sherwood*, 312 U. S. 584, 591 (1941). When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Accordingly, although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would "extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, *supra*, at 117–118 (citing *Soriano* v. *United States*, *supra*; *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955)). Accordingly, before finding that Congress intended here to exempt the States from satisfying the time-bar condition on its waiver of immunity, we should insist on some clear indication of such an intention.

Proceeding in accordance with these well-established principles, we observe that §2409a(f) expressly states that *any* civil action is time-barred unless filed within 12 years after the date it accrued. The statutory language makes no exception for civil actions by States. Nor is there any evidence in the legislative history suggesting that Congress intended to exempt the States from the condition attached to the immunity waiver.[24] These facts alone, in the light of our approach to sovereign immunity cases, would appear to compel the conclusion that States are not entitled to an exemption from the strictures of § 2409a(f).

The State, however, relies on the well-known canon of statutory construction that "[s]tatutes of limitation are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Weber* v. *Board of Harbor Comm'rs*, 18 Wall. 57, 70 (1873). Accord, *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132–133 (1938). Because § 2409a(f) does not expressly include the State, North Dakota urges, and the Court of Appeals held, that the State was not barred by the statute. While recognizing that immunity waivers by the United States are to be carefully construed, the Court of Appeals concluded that precedence should be given to the competing canon of statutory construction that statutes of limitations should not apply to the States absent express legislative inclusion. 671 F. 2d, at 275–276.

We do not agree. In fashioning sovereign-immunity waiver legislation, Congress is certainly free to exempt the States from a statute of limitations or any other condition of the waiver. But there is no merit to North Dakota's assertion that a condition on a congressional waiver of *federal* sovereign immunity should be regarded as inapplicable to

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[24] Recognizing that no express legislative history supports its position, North Dakota relies on congressional silence. As did the Court of Appeals, 671 F. 2d 271, 274–275 (CA8 1982), North Dakota notes the references in the House Committee Report, H. R. Rep. No. 92–1559 (1972), to "persons," "citizens," and "individual citizens," and the absence of any references to "States." However, to the extent that such general language has any relevance at all, the Report also refers to "plaintiff[s]," "owners of adjacent property," "land owner[s]," and "claimants"—all terms that can easily encompass States. See also S. Rep. No. 92–575 (1971) (using similar terms).

States in the absence of express intent to the contrary. This Court has never sanctioned such a rule. Quite the contrary, in *United States* v. *Louisiana*, 127 U. S. 182 (1888), the Court held that a general statute of limitations, one that did not expressly mention States, barred a State's claim against the Federal Government. And in *Minnesota* v. *United States*, 305 U. S., at 388–389, where the United States had waived its immunity on the condition that any suit against it had to be brought in a federal court, we concluded without hesitation that the plaintiff State's suit should have been dismissed for lack of jurisdiction, because it had been filed in state court, even though the federal-court condition did not expressly apply to States. Thus, neither Congress nor the decisions of this Court have suggested that the States are presumed to be exempt from satisfying the conditions placed by Congress on its immunity waivers; and, in light of our Constitution, which makes the federal law ultimately supreme, these holdings should not have been surprising.[25]

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[25] Contrary to JUSTICE O'CONNOR's contention, *post*, at 297, this Court has never "recognized sovereign prerogatives of other governmental units as bars to defenses asserted by the United States." In support of this novel proposition, JUSTICE O'CONNOR's dissent relies on *New Orleans* v. *United States*, 10 Pet. 662 (1836). In fact, to the extent that case is at all apposite, it supports the contrary view. The case involved a title dispute between the United States and the New Orleans municipal corporation. The National Government contended, *inter alia*, that certain official federal actions regarding the disputed property, "some of which were induced by the special application of the corporation, afford[ed] strong evidence, . . . not only of the right of the United States to the property in question, but that such right was fully recognized by the corporation." *Id.*, at 735. The Court found that these facts constituted an "admission" by the city that the Federal Government had title, and that the city's acts, if left unexplained, would have "strengthen[ed] the argument against the claim set up by the city." *Ibid.* The Court ultimately did not regard this evidence as prejudicing the city's claim, however, primarily because the city authorities were found to have acted in ignorance of their rights, due to their foreign language and habits, their civil law background, and their lack of familiarity with our Government and the principles of our jurisprudence. *Id.*, at 735–736. The Court also assumed that the city authorities did not have

We do not discount the importance of the generally applicable rule of statutory construction relied upon by the Court of Appeals. The judicially created rule that a sovereign is normally exempt from the operation of a generally worded statute of limitations has retained its vigor because it serves the public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. *Guaranty Trust Co.* v. *United States*, *supra*, at 132. Thus, in these cases, the rule would further the interests of the citizens of North Dakota, by affording them some protection against the negligence of state officials in failing to comply with the otherwise applicable statute of limitations.

Even assuming, however, that this rule has relevance in construing the applicability to the States of a congressionally imposed statute of limitations not expressly including the States, here the will of Congress is apparent and we must follow it. As the legislative history outlined in Part II above shows, Congress agreed with the Executive that § 2409a(f) was necessary for protection of national public interests. In general, a suit by a State against the United States affects the congressionally recognized national public interests to the same degree as does a suit by a private entity. Therefore, the judge-created rule designed to protect the interests of the citizens of one particular State must yield in the face of the evidence that Congress has determined that the national interest requires a contrary rule. We are convinced that Congress had no intention of exempting the States from compliance with § 2409a(f). That section must be applied to the States because they are "necessarily included by the nature of the mischiefs to be remedied." *Weber* v. *Board of Harbor Comm'rs*, *supra*, at 70. We thus conclude that States must fully adhere to the requirements of § 2409a(f) when suing the United States under the QTA.

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the power, by the acts relied on by the United States, to divest the city of a vested interest in the property. The Court's decision was in no way based, as the dissent suggests, *post*, at 297, n. 3, on the rule that "estoppel could not be asserted against a sovereign."

IV

North Dakota finally argues that, even if Congress intended to apply § 2409a(f) to it, and even if valid when applied in suits relating to other kinds of land, the section is unconstitutional under the equal-footing doctrine and the Tenth Amendment insofar as it purports to bar claims to lands constitutionally vested in the State. We are unable to agree.

The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law would not run afoul of the equal-footing doctrine or the Tenth Amendment, as asserted by North Dakota, but it would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment.[26] Section 2409a(f), however, does not purport to strip any State, or anyone else for that matter, of any property rights. The statute limits the time in which a quiet title suit against the United States can be filed; but, unlike an adverse possession provision, § 2409a(f) does not purport to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved.[27] Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits.[28]

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[26] The United States can, of course, exercise its eminent domain power to take title to state property. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 534 (1941). See also *United States* v. *Carmack*, 329 U. S. 230, 236–242 (1946).

[27] This discussion also answers the argument that our holding conflicts with the Submerged Lands Act of 1953, 43 U. S. C. § 1311, which confirmed in the States title to lands beneath navigable waters within their boundaries. If the river is navigable, the land in question belongs to North Dakota, in accordance with the Constitution and the Submerged Lands Act, regardless of whether North Dakota's suit to quiet its title is time-barred under § 2409a(f).

Thus, we see no constitutional infirmity in § 2409a(f). A constitutional claim can become time-barred just as any other claim can. See, *e. g., Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980); *Soriano* v. *United States*, 352 U. S. 270 (1957). Nothing in the Constitution requires otherwise.

V

Admittedly, North Dakota comes before us with an appealing case. Both lower courts held that the Little Missouri is navigable and that the State obtained title to the disputed land at statehood. The federal defendants have not asked this Court to review the correctness of these substantive holdings other than to submit that these determinations are time-barred by the QTA.[29] We agree with this submission. Whatever the merits of the title dispute may be, the federal defendants are correct: If North Dakota's suit is barred by § 2409a(f), the courts below had no jurisdiction to inquire into the merits.

In view of the foregoing, the judgment of the Court of Appeals is reversed. North Dakota's action may proceed, if at all, only under the QTA. If the State's suit was filed more than 12 years after its action accrued, the suit is barred by §2409a(f). Since the lower courts made no findings as to the date on which North Dakota's suit accrued, the cases must be remanded for further proceedings consistent with this opinion.

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[28] Whether, in the absence of a suit by it, the United States would ever acquire good title to the disputed area would, under the present status of the law, be strictly a matter of state law. See H. R. Rep. No. 92-1559, p. 10 (1972) (letter from the Attorney General) ("The State law of real property would of course apply to decide all questions not covered by Federal law"). In many instances, the United States would presumably eventually take the land by adverse possession, but, if so, it would be purely by virtue of state law. Here, North Dakota asserts that the disputed land is public trust land that cannot ever be taken by adverse possession under North Dakota law.

[29] The federal defendants stress that the United States still disputes the lower courts' conclusion that the Little Missouri River is navigable. They state that they did not seek review of that finding in this Court only because they deemed it inappropriate to burden this Court with this purely factual issue. Tr. of Oral Arg. 10. See this Court's Rule 17.

So ordered.

JUSTICE O'CONNOR, dissenting.

I agree with the Court that the sole remedy available to North Dakota is an action under the Quiet Title Act. Having concluded that Congress has permitted such suits, though, I would not reject the usual rule that statutes of limitation do not bar a sovereign, a rule that is especially appropriate in the context of these cases. Consequently, I dissent.

Since the Quiet Title Act is the sole relief available to North Dakota, we confront the question whether Congress intended the statute of limitations to bar actions by States. The Court resolves the question by invocation of the principle that waivers of sovereign immunity are to be strictly construed. See *ante*, at 287.[1] The question is not that simple.

Although it is indeed true that the Court construes waivers of sovereign immunity strictly, that principle of statutory construction is no more than an aid in the task of determining congressional intent. In a close case, it may help the Court choose between two equally plausible constructions. It cannot, however, grant the Court authority to narrow judicially the waiver that Congress intended. *United States* v. *Kubrick*, 444 U. S. 111, 118 (1979); *Indian Towing Co.* v. *United States*, 350 U. S. 61, 69 (1955). The mere observation that a statute waives sovereign immunity, then, cannot resolve questions of construction. The Court still must consider all indicia of congressional intent. Considering all the evidence, I cannot agree with the Court's conclusion that Congress intended to subject the States to a statute of limitations that would prevent their assertion of title to lands held in trust for the public.

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[1] The Court's reliance on this principle is surprising, since it expressly declines to decide whether, without the Quiet Title Act, sovereign immunity would bar this action. *Ante*, at 285–286. Thus, as far as the Court is concerned, the Quiet Title Act may not in fact be a waiver of sovereign immunity, and these cases then would not present the predicate for the application of the principle that waivers are construed narrowly. Since I believe, for the reasons suggested by the Court, *ante*, at 281–282, that the Quiet Title Act was necessary to permit this action, in my view the principle of strict construction does inform, although it does not control, our inquiry into congressional intent.

The common law has long accepted the principle "*nullum tempus occurrit regi*"—neither laches nor statutes of limitations will bar the sovereign. See, *e. g.*, 10 W. Holdsworth, A History of English Law 355 (1938); D. Gibbons, A Treatise on the Law of Limitation and Prescription 62 (1835). The courts of this country accepted the principle from English law. See, *e. g.*, *Weber* v. *Board of Harbor Comm'rs*, 18 Wall. 57 (1873); *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735 (1824); *Iverson & Robinson* v. *Dubose*, 27 Ala. 418, 422 (1855); *Stoughton* v. *Baker*, 4 Mass. 522, 528 (1803); see generally J. May, Angell on Limitations 29–30 (5th ed. 1869). As this Court observed: "So complete has been its acceptance that the implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included." *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 133 (1938). In this country, courts adopted the rule, not on the theory that an "impeccable" sovereign could not be guilty of laches, but because of the public policies served by the doctrine. The public interest in preserving public rights and property from injury and loss attributable to the negligence of public officers and agents, through whom the public must act, justified a special rule for the sovereign.

These policies reach their apex in the case of lands held in trust for the public. The interests of the sovereign, so widespread and varied, hinder it in the exercise of the vigilance in protecting rights that we require of private parties. Yet the public must not lose its rights because of the constraints on the sovereign.

> "If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government." *Lindsey* v. *Lessee of Miller*, 6 Pet. 666, 673 (1832).

Accord, *Guaranty Trust Co.* v. *United States*, *supra*, at 132; *Weber* v. *Board of Harbor Comm'rs*, *supra*, at 68, 70; *United States* v. *Knight*, 14 Pet. 301, 314 (1840); J. May, *supra*, at 29.[2]

The lands in controversy here are held in trust for the public by North Dakota, see App. to Pet. for Cert. in No. 81-2337, p. A-6; *United Plainsmen* v. *North Dakota State*

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[2] The case for protecting the sovereign from the running of time is weaker when the lands are held other than as public trust lands. When, for instance, a sovereign holds lands in its proprietary capacity, as the United States would hold the title that it asserts to these lands, *ante*, at 277, time may run against the sovereign. See *Weber* v. *Board of Harbor Comm'rs*, 18 Wall., at 68 ("Where lands are held by the State simply for sale or other disposition, and not as sovereign in trust for the public, there is some reason in requiring the assertion of her rights within a limited period . . .") (dictum).

Water Conservation Comm'n, 247 N. W. 2d 457 (N. D. 1976). This case, therefore, implicates the core policies underlying the doctrine, and we should be extremely reluctant to reject the usual rule that time will not bar the sovereign.

The Court, however, dismisses this rule, apparently on the theory that it does not apply in actions between two sovereigns. But the authority that it cites for that proposition is weak at best. *United States* v. *Louisiana*, 127 U. S. 182 (1888), involved a claim for money rather than a dispute to title over public trust lands. More important, the parties never argued for the application of the rule that time does not bar the sovereign. See Brief for Appellant and Brief for Appellee in *United States* v. *Louisiana*, O. T. 1887, No. 1388. The Court's decision in that case therefore cannot serve as authority for rejecting the rule when, as is the situation here, it is raised. Nor does *Minnesota* v. *United States*, 305 U. S. 382 (1939), support the Court. There, a State sought to sue the United States in state court. Construing the waiver of sovereign immunity narrowly, we held that the United States had only waived its immunity as to suits in federal court, and we applied that condition against the State. Since no general rule permits a sovereign to maintain a suit in any forum it chooses, the holding of *Minnesota* reflects nothing more than the usual reluctance to construe waivers of sovereign immunity broadly in the absence of any countervailing considerations.

Thus, our precedents do not reject the principle that time does not bar the sovereign in conflicts between sovereigns. On the contrary, our precedents suggest that a sovereign *can* invoke this principle against another sovereign. In *Rhode Island* v. *Massachusetts*, 15 Pet. 233 (1841), the Court declined to apply the ordinary rule of limitations in a dispute between sovereign States. Chief Justice Taney observed: "[I]t would be impossible with any semblance of justice to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals . . . ." *Id.*, at 273. In particular, when lands held in trust for the public are at stake, the Court has recognized sovereign prerogatives of other governmental units as bars to defenses asserted by the United States. See *New Orleans* v. *United States*, 10 Pet. 662 (1836).[3] Consequently, I disagree with the Court's conclusion that the principle that time will not bar the sovereign has no application in these cases.

Turning to the statute at issue here, the circumstances of its enactment indicate that Congress did not intend to bar actions by States. As general background, we know that Congress was aware of the rule that, to affect the government, an enactment imposing a burden or a limitation must expressly include the sovereign. See, *e. g.*, *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 667 (1979). The particular incident that spurred Congress to pass the Quiet Title Act was a dispute between private landowners and the Federal Government. See Hearings on S. 216 et al. before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 83–85 (1971) (affidavit of A. L. Robinson). The statements in the hearings reflect a focus on disputes between private citizens and the Federal Government. See, *e. g.*, *id.*, at 20 (statement of Shiro

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[3] In *New Orleans* v. *United States*, the United States argued that the city of New Orleans was estopped to assert title to certain lands held for the public. At the time, estoppel could not be asserted against a sovereign, see, *e. g.*, *Filor* v. *United States*, 9 Wall. 45, 49 (1870), and the Court declined to estop the city, largely on the ground that the lands were held in trust for the public and, since the sovereign could not by act convey them, the sovereign's acts could not estop it from asserting that they were not conveyed. Although the protection against estoppel has since largely dissipated, see generally Note, Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry? 56 St. John's L. Rev. 114 (1981); K. Davis, Administrative Law of the Seventies § 17.01 (1976), the application of that protection in *New Orleans* contradicts the view of the majority that in controversies between the United States and another sovereign, only the United States can rely on sovereign attributes.

Kashiwa) (referring to claims of "private citizens"); *id.*, at 55, 58 (statement of T. E. McKnight) (observing that "private landowners" had no right to sue the Government). See also S. Rep. No. 92–575, pp. 1, 2 (1971) (recognizing inequity of denying action to "private citizen" and explaining that bill would enable "citizen" to have his day in court). Finally, the House Report explained the limitations provision in the Quiet Title Act as designed to give "*persons*" a certain amount of time to sue. H. R. Rep. No. 92–1559, p. 5 (1972).

Indeed, this Court has already been called upon to conform the provisions of the Quiet Title Act—enacted by Congress with private citizens in mind—to the special requirements of litigation involving States. In *California* v. *Arizona*, 440 U. S. 59 (1979), California sought to sue Arizona and the United States, in a quiet title action in which both defendants were indispensable parties. Under the Constitution, this Court had original jurisdiction over the claim against Arizona, U. S. Const., Art. III, §2, and Congress had conferred exclusive jurisdiction on this Court. 28 U. S. C. §1251(a)(1). The claim against the United States, however, could only be maintained under the Quiet Title Act, which vested exclusive jurisdiction in the district courts. 28 U. S. C. §1346(f). In spite of the general language placing *all* quiet title actions against the United States in the district courts, we concluded that Congress did not intend to divest this Court of its jurisdiction. Thus, while Congress clearly intended that States be able to maintain quiet title actions, the procedural provisions drafted with the private citizen in mind need not be applied with slavish literalness to States.[4]

Finally, we cannot ignore the special nature of the lands at issue in this case. The beds of navigable waters pass to the States when they achieve statehood under the constitutional equal footing doctrine, as an incident of sovereignty. *Montana* v. *United States*, 450 U. S. 544, 551 (1981); *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845). And the lands are of critical importance to North Dakota, which holds them in its sovereign capacity in trust for its citizens.[5] Congress has recognized the special importance of these lands in the Submerged Lands Act, 67 Stat. 30, 43 U. S. C. § 1301 *et seq.*[6] Until today, the Court too has shown special sensitivity to the importance of these lands, recognizing the strongest presumption that Congress will not act to convey the lands rather than to preserve them for the State. *Montana* v. *United States*, *supra*, at 552. Given that solicitude for the State's ownership of these lands, it becomes extremely difficult to believe that Congress intended to deny States dominion over these lands by silently extinguishing their right to quiet title. I would affirm the judgment below.

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[4] Cf. *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 667 (1979) (rule that statute must expressly include sovereign is particularly applicable "where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage").

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[5] Cf. *United States* v. *Oregon*, 295 U. S. 1, 14 (1935) ("Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. . . . For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce").

[6] In § 3(a) of the Act, 60 Stat. 30, 43 U. S. C. § 1311(a), Congress provided:

"It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . ."

COMMISSIONER OF INTERNAL REVENUE *v.* TUFTS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1536. Argued November 29, 1982—Decided May 2, 1983

Section 752(d) of the Internal Revenue Code of 1954 (IRC) provides that liabilities involved in the sale or exchange of a partnership interest are to be treated "in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships." Under § 1001(a) of the IRC, the gain or loss from a sale or other disposition of property is defined as the difference between "the amount realized" on the disposition and the property's adjusted basis. Section 1001(b) defines the "amount realized" as "the sum of any money received plus the fair market value of the property (other than money) received." A general partnership formed by respondents in 1970 to construct an apartment complex entered into a $1,851,500 nonrecourse mortgage loan with a savings association. The complex was completed in 1971. Due to the partners' capital contributions to the partnership and income tax deductions for their allocable shares of ordinary losses and depreciation, the partnership's claimed adjusted basis in the property in 1972 was $1,455,740. Because of an unanticipated reduction in rental income, the partnership was unable to make the payments due on the mortgage. Each partner thereupon sold his interest to a third party, who assumed the mortgage. The fair market value on the date of transfer did not exceed $1,400,000. Each partner reported the sale on his income tax return and indicated a partnership loss of $55,740. The Commissioner of Internal Revenue, however, determined that the sale resulted in a partnership gain of approximately $400,000 on the theory that the partnership had realized the full amount of the nonrecourse obligation. The United States Tax Court upheld the deficiencies, but the Court of Appeals reversed.

Held: When a taxpayer sells or disposes of property encumbered by a nonrecourse obligation exceeding the fair market value of the property sold, as in this case, the Commissioner may require him to include in the "amount realized" the outstanding amount of the obligation; the fair market value of the property is irrelevant to this calculation. Cf. *Crane* v. *Commissioner*, 331 U. S. 1. Pp. 304–317.

(a) When the mortgagor's obligation to repay the mortgage loan is canceled, he is relieved of his responsibility to repay the sum he originally received and thus realizes value to that extent within the meaning of § 1001(b). To permit the taxpayer to limit his realization to the fair market value of the property would be to recognize a tax loss for which he has suffered no corresponding economic loss. A taxpayer must account for the proceeds of obligations he has received tax-free and has included in basis. Nothing in either § 1001(b) or in this Court's prior decisions requires the Commissioner to permit a taxpayer to treat a sale of encumbered property asymmetrically, by including the proceeds of the nonrecourse obligation in basis but not accounting for the proceeds upon transfer of the property. Pp. 304–314.

(b) Section 752(c) of the IRC—which provides that for purposes of § 752 "a liability to which property is subject shall, to the extent of the fair market value of such property, be considered as a liability of the owner of the property"—does not authorize this type of asymmetrical treatment in the sale or disposition of partnership property. Rather, the legislative history indicates that the fair market value limitation of § 752(c) was intended to apply only to transactions between a partner and his partnership under §§ 752(a) and (b), and was not intended to limit the amount realized in a sale or exchange of a partnership interest under § 752(d). Pp. 314–317.

651 F. 2d 1058, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, *post*, p. 317.

Stuart A. Smith argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Michael L. Paup*, and *Gilbert S. Rothenberg*.

Ronald M. Mankoff argued the cause for respondents. With him on the brief was *Charles D. Pulman*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Over 35 years ago, in *Crane* v. *Commissioner*, 331 U. S. 1 (1947), this Court ruled that a taxpayer, who sold property encumbered by a nonrecourse mortgage (the amount of the

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*Briefs of *amici curiae* urging affirmance were filed by *Louis Regenstein* for the Empire Real Estate Board, Inc.; and by *Wayne G. Barnett*, *pro se*.

mortgage being less than the property's value), must include the unpaid balance of the mortgage in the computation of the amount the taxpayer realized on the sale. The case now before us presents the question whether the same rule applies when the unpaid amount of the nonrecourse mortgage exceeds the fair market value of the property sold.

I

On August 1, 1970, respondent Clark Pelt, a builder, and his wholly owned corporation, respondent Clark, Inc., formed a general partnership. The purpose of the partnership was to construct a 120-unit apartment complex in Duncanville, Tex., a Dallas suburb. Neither Pelt nor Clark, Inc., made any capital contribution to the partnership. Six days later, the partnership entered into a mortgage loan agreement with the Farm & Home Savings Association (F&H). Under the agreement, F&H was committed for a $1,851,500 loan for the complex. In return, the partnership executed a note and a deed of trust in favor of F&H. The partnership obtained the loan on a nonrecourse basis: neither the partnership nor its partners assumed any personal liability for repayment of the loan. Pelt later admitted four friends and relatives, respondents Tufts, Steger, Stephens, and Austin, as general partners. None of them contributed capital upon entering the partnership.

The construction of the complex was completed in August 1971. During 1971, each partner made small capital contributions to the partnership; in 1972, however, only Pelt made a contribution. The total of the partners' capital contributions was $44,212. In each tax year, all partners claimed as income tax deductions their allocable shares of ordinary losses and depreciation. The deductions taken by the partners in 1971 and 1972 totalled $439,972. Due to these contributions and deductions, the partnership's adjusted basis in the property in August 1972 was $1,455,740.

In 1971 and 1972, major employers in the Duncanville area laid off significant numbers of workers. As a result, the partnership's rental income was less than expected, and it was unable to make the payments due on the mortgage. Each partner, on August 28, 1972, sold his partnership interest to an unrelated third party, Fred Bayles. As consideration, Bayles agreed to reimburse each partner's sale expenses up to $250; he also assumed the nonrecourse mortgage.

On the date of transfer, the fair market value of the property did not exceed $1,400,000. Each partner reported the sale on his federal income tax return and indicated that a partnership loss of $55,740 had been sustained.[1] The Commissioner of Internal Revenue, on audit, determined that the sale resulted in a partnership capital gain of approximately $400,000. His theory was that the partnership had realized the full amount of the nonrecourse obligation.[2]

Relying on *Millar* v. *Commissioner*, 577 F. 2d 212, 215 (CA3), cert. denied, 439 U. S. 1046 (1978), the United States Tax Court, in an unreviewed decision, upheld the asserted deficiencies. 70 T. C. 756 (1978). The United States Court of Appeals for the Fifth Circuit reversed. 651 F. 2d 1058 (1981). That court expressly disagreed with the *Millar* analysis, and, in limiting *Crane* v. *Commissioner*, *supra*, to its facts, questioned the theoretical underpinnings of the *Crane* decision. We granted certiorari to resolve the conflict. 456 U. S. 960 (1982).

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[1] The loss was the difference between the adjusted basis, $1,455,740, and the fair market value of the property, $1,400,000. On their individual tax returns, the partners did not claim deductions for their respective shares of this loss. In their petitions to the Tax Court, however, the partners did claim the loss.

[2] The Commissioner determined the partnership's gain on the sale by subtracting the adjusted basis, $1,455,740, from the liability assumed by Bayles, $1,851,500. Of the resulting figure, $395,760, the Commissioner treated $348,661 as capital gain, pursuant to § 741 of the Internal Revenue Code of 1954, 26 U. S. C. § 741, and $47,099 as ordinary gain under the recapture provisions of § 1250 of the Code. The application of § 1250 in determining the character of the gain is not at issue here.

II

Section 752(d) of the Internal Revenue Code of 1954, 26 U. S. C. § 752(d), specifically provides that liabilities involved in the sale or exchange of a partnership interest are to "be treated in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships." Section 1001 governs the determination of gains and losses on the disposition of property. Under § 1001(a), the gain or loss from a sale or other disposition of property is defined as the difference between "the amount realized" on the disposition and the property's adjusted basis. Subsection (b) of § 1001 defines "amount realized": "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received." At issue is the application of the latter provision to the disposition of property encumbered by a nonrecourse mortgage of an amount in excess of the property's fair market value.

A

In *Crane* v. *Commissioner*, *supra*, this Court took the first and controlling step toward the resolution of this issue. Beulah B. Crane was the sole beneficiary under the will of her deceased husband. At his death in January 1932, he owned an apartment building that was then mortgaged for an amount which proved to be equal to its fair market value, as determined for federal estate tax purposes. The widow, of course, was not personally liable on the mortgage. She operated the building for nearly seven years, hoping to turn it into a profitable venture; during that period, she claimed income tax deductions for depreciation, property taxes, interest, and operating expenses, but did not make payments upon the mortgage principal. In computing her basis for the depreciation deductions, she included the full amount of the mortgage debt. In November 1938, with her hopes unfulfilled and the mortgagee threatening foreclosure, Mrs. Crane sold the building. The purchaser took the property subject to the mortgage and paid Crane $3,000; of that amount, $500 went for the expenses of the sale.

Crane reported a gain of $2,500 on the transaction. She reasoned that her basis in the property was zero (despite her earlier depreciation deductions based on including the amount of the mortgage) and that the amount she realized from the sale was simply the cash she received. The Commissioner disputed this claim. He asserted that Crane's basis in the property, under § 113(a)(5) of the Revenue Act of 1938, 52 Stat. 490 (the current version is § 1014 of the 1954 Code, as amended, 26 U. S. C. § 1014 (1976 ed. and Supp. V)), was the property's fair market value at the time of her husband's death, adjusted for depreciation in the interim, and that the amount realized was the net cash received plus the amount of the outstanding mortgage assumed by the purchaser.

In upholding the Commissioner's interpretation of § 113(a)(5) of the 1938 Act,[1] the Court observed that to regard merely the taxpayer's equity in the property as her basis would lead to depreciation deductions less than the actual physical deterioration of the property, and would require the basis to be recomputed with each payment on the mortgage. 331 U. S., at 9–10. The Court rejected Crane's claim that any loss due to depreciation belonged to the mortgagee. The effect of the Court's ruling was that the taxpayer's basis was the value of the property undiminished by the mortgage. *Id.*, at 11.

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[1] Section 113(a)(5) defined the basis of "property . . . acquired by . . . devise . . . or by the decedent's estate from the decedent" as "the fair market value of such property at the time of such acquisition." The Court interpreted the term "property" to refer to the physical land and buildings owned by Crane or the aggregate of her rights to control and dispose of them. 331 U. S., at 6.

The Court next proceeded to determine the amount realized under § 111(b) of the 1938 Act, 52 Stat. 484 (the current version is § 1001(b) of the 1954 Code, 26 U. S. C. § 1001(b)). In order to avoid the "absurdity," see 331 U. S., at 13, of Crane's realizing only $2,500 on the sale of property worth over a quarter of a million dollars, the Court treated the amount realized as it had treated basis, that is, by including the outstanding value of the mortgage. To do otherwise would have permitted Crane to recognize a tax loss unconnected with any actual economic loss. The Court refused to construe one section of the Revenue Act so as "to frustrate the Act as a whole." *Ibid.*

Crane, however, insisted that the nonrecourse nature of the mortgage required different treatment. The Court, for two reasons, disagreed. First, excluding the nonrecourse debt from the amount realized would result in the same absurdity and frustration of the Code. *Id.*, at 13–14. Second, the Court concluded that Crane obtained an economic benefit from the purchaser's assumption of the mortgage identical to the benefit conferred by the cancellation of personal debt. Because the value of the property in that case exceeded the amount of the mortgage, it was in Crane's economic interest to treat the mortgage as a personal obligation; only by so doing could she realize upon sale the appreciation in her equity represented by the $2,500 boot. The purchaser's assumption of the liability thus resulted in a taxable economic benefit to her, just as if she had been given, in addition to the boot, a sum of cash sufficient to satisfy the mortgage.[4]

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[4] Crane also argued that even if the statute required the inclusion of the amount of the nonrecourse debt, that amount was not Sixteenth Amendment income because the overall transaction had been "by all dictates of common sense . . . a ruinous disaster." Brief for Petitioner in *Crane* v. *Commissioner*, O. T. 1946, No. 68, p. 51. The Court noted, however, that Crane had been entitled to and actually took depreciation deductions for nearly seven years. To allow her to exclude sums on which those deductions were based from the calculation of her taxable gain would permit her

In a footnote, pertinent to the present case, the Court observed:

> "Obviously, if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable cannot realize a benefit equal to the mortgage. Consequently, a different problem might be encountered where a mortgagor abandoned the property or transferred it subject to the mortgage without receiving boot. That is not this case." *Id.*, at 14, n. 37.

B

This case presents that unresolved issue. We are disinclined to overrule *Crane*, and we conclude that the same rule applies when the unpaid amount of the nonrecourse mortgage exceeds the value of the property transferred. *Crane* ultimately does not rest on its limited theory of economic benefit; instead, we read *Crane* to have approved the Commissioner's decision to treat a nonrecourse mortgage in this context as a true loan. This approval underlies *Crane*'s holdings that the amount of the nonrecourse liability is to be included in calculating both the basis and the amount realized on disposition. That the amount of the loan exceeds the fair market value of the property thus becomes irrelevant.

When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer. When he fulfills the obligation, the repayment of the loan likewise has no effect on his tax liability.

Another consequence to the taxpayer from this obligation occurs when the taxpayer applies the loan proceeds to the purchase price of property used to secure the loan. Because of the obligation to repay, the taxpayer is entitled to include the amount of the loan in computing his basis in the property; the loan, under § 1012, is part of the taxpayer's cost of the

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"a double deduction . . . on the same loss of assets." The Sixteenth Amendment, it was said, did not require that result. 331 U. S., at 15–16.

property. Although a different approach might have been taken with respect to a nonrecourse mortgage loan,[5] the Commissioner has chosen to accord it the same treatment he gives to a recourse mortgage loan. The Court approved that choice in *Crane*, and the respondents do not challenge it here. The choice and its resultant benefits to the taxpayer are predicated on the assumption that the mortgage will be repaid in full.

When encumbered property is sold or otherwise disposed of and the purchaser assumes the mortgage, the associated extinguishment of the mortgagor's obligation to repay is accounted for in the computation of the amount realized.[6] See *United States* v. *Hendler*, 303 U. S. 564, 566–567 (1938). Because no difference between recourse and nonrecourse obligations is recognized in calculating basis,[7] *Crane* teaches that the Commissioner may ignore the nonrecourse nature of the obligation in determining the amount realized upon disposition of the encumbered property. He thus may include in the amount realized the amount of the nonrecourse mortgage assumed by the purchaser. The rationale for this treatment is that the original inclusion of the amount of the mortgage in basis rested on the assumption that the mortgagor incurred an obligation to repay. Moreover, this treatment balances the fact that the mortgagor originally received the proceeds of the nonrecourse loan tax-free on the same assumption.

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[5] The Commissioner might have adopted the theory, implicit in Crane's contentions, that a nonrecourse mortgage is not true debt, but, instead, is a form of joint investment by the mortgagor and the mortgagee. On this approach, nonrecourse debt would be considered a contingent liability, under which the mortgagor's payments on the debt gradually increase his interest in the property while decreasing that of the mortgagee. Note, Federal Income Tax Treatment of Nonrecourse Debt, 82 Colum. L. Rev. 1498, 1514 (1982); Lurie, Mortgagor's Gain on Mortgaging Property for More than Cost Without Personal Liability, 6 Tax L. Rev. 319, 323 (1951); cf. Brief for Respondents 16 (nonrecourse debt resembles preferred stock). Because the taxpayer's investment in the property would not include the nonrecourse debt, the taxpayer would not be permitted to include that debt in basis. Note, 82 Colum. L. Rev., at 1515; cf. *Gibson Products Co. v. United States*, 637 F. 2d 1041, 1047–1048 (CA5 1981) (contingent nature of obligation prevents inclusion in basis of oil and gas leases of nonrecourse debt secured by leases, drilling equipment, and percentage of future production).

We express no view as to whether such an approach would be consistent with the statutory structure and, if so, and *Crane* were not on the books, whether that approach would be preferred over *Crane*'s analysis. We note only that the *Crane* Court's resolution of the basis issue presumed that when property is purchased with proceeds from a nonrecourse mortgage, the purchaser becomes the sole owner of the property. 331 U. S., at 6. Under the *Crane* approach, the mortgagee is entitled to no portion of the basis. *Id.*, at 10, n. 28. The nonrecourse mortgage is part of the mortgagor's investment in the property, and does not constitute a coinvestment by the mortgagee. But see Note, 82 Colum. L. Rev., at 1513 (treating nonrecourse mortgage as coinvestment by mortgagee and critically concluding that *Crane* departed from traditional analysis that basis is taxpayer's investment in property).

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[6] In this case, respondents received the face value of their note as loan proceeds. If respondents initially had given their note at a discount, the amount realized on the sale of the securing property might be limited to the funds actually received. See *Commissioner* v. *Rail Joint Co.*, 61 F. 2d 751, 752 (CA2 1932) (cancellation of indebtedness); *Fashion Park, Inc.* v. *Commissioner*, 21 T. C. 600, 606 (1954) (same). See generally J. Sneed, The Configurations of Gross Income 319 (1967) ("[I]t appears settled that the reacquisition of bonds at a discount by the obligor results in gain only to the extent the issue price, where this is less than par, exceeds the cost of reacquisition").

[7] The Commissioner's choice in *Crane* "laid the foundation stone of most tax shelters," Bittker, Tax Shelters, Nonrecourse Debt, and the *Crane* Case, 33 Tax L. Rev. 277, 283 (1978), by permitting taxpayers who bear no risk to take deductions on depreciable property. Congress recently has acted to curb this avoidance device by forbidding a taxpayer to take depreciation deductions in excess of amounts he has at risk in the investment. Pub. L. 94–455, § 204(a), 90 Stat. 1531 (1976), 26 U. S. C. § 465; Pub. L. 95–600, §§ 201–204, 92 Stat. 2814–2817 (1978), 26 U. S. C. § 465(a) (1976 ed., Supp. V). Real estate investments, however, are exempt from this prohibition. § 465(c)(3)(D) (1976 ed., Supp. V). Although this congressional action may foreshadow a day when nonrecourse and recourse debts will be treated differently, neither Congress nor the Commissioner has sought to alter *Crane*'s rule of including nonrecourse liability in both basis and the amount realized.

Unless the outstanding amount of the mortgage is deemed to be realized, the mortgagor effectively will have received untaxed income at the time the loan was extended and will have received an unwarranted increase in the basis of his property.[8] The Commissioner's interpretation of § 1001(b) in this fashion cannot be said to be unreasonable.

C

The Commissioner in fact has applied this rule even when the fair market value of the property falls below the amount of the nonrecourse obligation. Treas. Reg. § 1.1001–2(b), 26 CFR § 1.1001–2(b) (1982);[9] Rev. Rul. 76–111, 1976–1 Cum. Bull. 214. Because the theory on which the rule is based applies equally in this situation, see *Millar* v. *Commissioner*, 67 T. C. 656, 660 (1977), aff'd on this issue, 577 F. 2d 212, 215–216 (CA3), cert. denied, 439 U. S. 1046 (1978);[10] *Mendham Corp.* v. *Commissioner*, 9 T. C. 320, 323–324 (1947); *Lutz & Schramm Co.* v. *Commissioner*, 1 T. C. 682, 688–689 (1943), we have no reason, after *Crane*, to question this treatment.[11]

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[8] Although the *Crane* rule has some affinity with the tax benefit rule, see Bittker, *supra*, at 282; Del Cotto, Sales and Other Dispositions of Property Under Section 1001: The Taxable Event, Amount Realized and Related Problems of Basis, 26 Buffalo L. Rev. 219, 323–324 (1977), the analysis we adopt is different. Our analysis applies even in the situation in which no deductions are taken. It focuses on the obligation to repay and its subsequent extinguishment, not on the taking and recovery of deductions. See generally Note, 82 Colum. L. Rev., at 1526–1529.

[9] The regulation was promulgated while this case was pending before the Court of Appeals for the Fifth Circuit. T. D. 7741, 45 Fed. Reg. 81743, 1981–1 Cum. Bull. 430 (1980). It merely formalized the Commissioner's prior interpretation, however.

[10] The Court of Appeals for the Third Circuit in *Millar* affirmed the Tax Court on the theory that inclusion of nonrecourse liability in the amount realized was necessary to prevent the taxpayer from enjoying a double deduction. 577 F. 2d, at 215; cf. n. 4, *supra*. Because we resolve the question on another ground, we do not address the validity of the double deduction rationale.

[11] Professor Wayne G. Barnett, as *amicus* in the present case, argues that the liability and property portions of the transaction should be ac-

Respondents received a mortgage loan with the concomitant obligation to repay by the year 2012. The only difference between that mortgage and one on which the borrower

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counted for separately. Under his view, there was a transfer of the property for $1.4 million, and there was a cancellation of the $1.85 million obligation for a payment of $1.4 million. The former resulted in a capital loss of $50,000, and the latter in the realization of $450,000 of ordinary income. Taxation of the ordinary income might be deferred under § 108 by a reduction of respondents' bases in their partnership interests.

Although this indeed could be a justifiable mode of analysis, it has not been adopted by the Commissioner. Nor is there anything to indicate that the Code requires the Commissioner to adopt it. We note that Professor Barnett's approach does assume that recourse and nonrecourse debt may be treated identically.

The Commissioner also has chosen not to characterize the transaction as cancellation of indebtedness. We are not presented with and do not decide the contours of the cancellation-of-indebtedness doctrine. We note only that our approach does not fall within certain prior interpretations of that doctrine. In one view, the doctrine rests on the same initial premise as our analysis here—an obligation to repay—but the doctrine relies on a freeing-of-assets theory to attribute ordinary income to the debtor upon cancellation. See *Commissioner* v. *Jacobson*, 336 U. S. 28, 38–40 (1949); *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3 (1931). According to that view, when nonrecourse debt is forgiven, the debtor's basis in the securing property is reduced by the amount of debt canceled, and realization of income is deferred until the sale of the property. See *Fulton Gold Corp.* v. *Commissioner*, 31 B. T. A. 519, 520 (1934). Because that interpretation attributes income only when assets are freed, however, an insolvent debtor realizes income just to the extent his assets exceed his liabilities after the cancellation. *Lakeland Grocery Co.* v. *Commissioner*, 36 B. T. A. 289, 292 (1937). Similarly, if the nonrecourse indebtedness exceeds the value of the securing property, the taxpayer never realizes the full amount of the obligation canceled because the tax law has not recognized negative basis.

Although the economic benefit prong of *Crane* also relies on a freeing-of-assets theory, that theory is irrelevant to our broader approach. In the context of a sale or disposition of property under § 1001, the extinguishment of the obligation to repay is not ordinary income; instead, the amount of the canceled debt is included in the amount realized, and enters into the computation of gain or loss on the disposition of property. According to *Crane*, this treatment is no different when the obligation is nonrecourse: the basis is not reduced as in the cancellation-of-indebtedness context, and is personally liable is that the mortgagee's remedy is limited to foreclosing on the securing property. This difference does not alter the nature of the obligation; its only effect is to shift from the borrower to the lender any potential loss caused by devaluation of the property.[12] If the fair market value of the property falls below the amount of the outstanding obligation, the mortgagee's ability to protect its interests is impaired, for the mortgagor is free to abandon the property to the mortgagee and be relieved of his obligation.

This, however, does not erase the fact that the mortgagor received the loan proceeds tax-free and included them in his basis on the understanding that he had an obligation to repay the full amount. See *Woodsam Associates, Inc.* v. *Commissioner*, 198 F. 2d 357, 359 (CA2 1952); Bittker, *supra* n. 7, at 284. When the obligation is canceled, the mortgagor is relieved of his responsibility to repay the sum he originally received and thus realizes value to that extent within the meaning of § 1001(b). From the mortgagor's point of view, when his obligation is assumed by a third party who purchases the encumbered property, it is as if the mortgagor first had been paid with cash borrowed by the third party from the mortgagee on a nonrecourse basis, and then had used the cash to satisfy his obligation to the mortgagee.

Moreover, this approach avoids the absurdity the Court recognized in *Crane*. Because of the remedy accompanying the mortgage in the nonrecourse situation, the depreciation

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the full value of the outstanding liability is included in the amount realized. Thus, the problem of negative basis is avoided.

[12] In his opinion for the Court of Appeals in *Crane*, Judge Learned Hand observed:

"[The mortgagor] has all the income from the property; he manages it; he may sell it; any increase in its value goes to him; any decrease falls on him, until the value goes below the amount of the lien. . . . When therefore upon a sale the mortgagor makes an allowance to the vendee of the amount of the lien, he secures a release from a charge upon his property quite as though the vendee had paid him the full price on condition that before he took title the lien should be cleared. . . ." 153 F. 2d 504, 506 (CA2 1945).

in the fair market value of the property is relevant economically only to the mortgagee, who by lending on a nonrecourse basis remains at risk. To permit the taxpayer to limit his realization to the fair market value of the property would be to recognize a tax loss for which he has suffered no corresponding economic loss.[13] Such a result would be to construe "one section of the Act . . . so as . . . to defeat the intention of another or to frustrate the Act as a whole." 331 U. S., at 13.

In the specific circumstances of *Crane*, the economic benefit theory did support the Commissioner's treatment of the nonrecourse mortgage as a personal obligation. The footnote in *Crane* acknowledged the limitations of that theory when applied to a different set of facts. *Crane* also stands for the broader proposition, however, that a nonrecourse loan should be treated as a true loan. We therefore hold that a taxpayer must account for the proceeds of obligations he has received tax-free and included in basis. Nothing in either § 1001(b) or in the Court's prior decisions requires the Commissioner to permit a taxpayer to treat a sale of encumbered property asymmetrically, by including the proceeds of the nonrecourse obligation in basis but not accounting for the proceeds upon transfer of the encumbered property. See

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[13] In the present case, the Government bore the ultimate loss. The nonrecourse mortgage was extended to respondents only after the planned complex was endorsed for mortgage insurance under §§ 221(b) and (d)(4) of the National Housing Act, 12 U. S. C. §§ 1715*l*(b) and (d)(4) (1976 ed. and Supp. V). After acquiring the complex from respondents, Bayles operated it for a few years, but was unable to make it profitable. In 1974, F&H foreclosed, and the Department of Housing and Urban Development paid off the lender to obtain title. In 1976, the Department sold the complex to another developer for $1,502,000. The sale was financed by the Department's taking back a note for $1,314,800 and a nonrecourse mortgage. To fail to recognize the value of the nonrecourse loan in the amount realized, therefore, would permit respondents to compound the Government's loss by claiming the tax benefits of that loss for themselves.

Estate of Levine v. *Commissioner*, 634 F. 2d 12, 15 (CA2 1980).

III

Relying on the Code's § 752(c), 26 U. S. C. § 752(c), however, respondents argue that Congress has provided for precisely this type of asymmetrical treatment in the sale or disposition of partnership property. Section 752 prescribes the tax treatment of certain partnership transactions,[11] and § 752(c) provides that "[f]or purposes of this section, a liability to which property is subject shall, to the extent of the fair market value of such property, be considered as a liability of the owner of the property." Section 752(c) could be read to apply to a sale or disposition of partnership property, and thus to limit the amount realized to the fair market value of the property transferred. Inconsistent with this interpretation, however, is the language of § 752(d), which specifically mandates that partnership liabilities be treated "in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships." The apparent conflict of these subsections renders the facial meaning of the statute ambiguous, and therefore we must look to the statute's structure and legislative history.

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[11] Section 752 provides:

"(a) Increase in partner's liabilities

"Any increase in a partner's share of the liabilities of a partnership, or any increase in a partner's individual liabilities by reason of the assumption by such partner of partnership liabilities, shall be considered as a contribution of money by such partner to the partnership.

"(b) Decrease in partner's liabilities

"Any decrease in a partner's share of the liabilities of a partnership, or any decrease in a partner's individual liabilities by reason of the assumption by the partnership of such individual liabilities, shall be considered as a distribution of money to the partner by the partnership.

"(c) Liability to which property is subject

"For purposes of this section, a liability to which property is subject shall, to the extent of the fair market value of such property, be considered as a liability of the owner of the property.

"(d) Sale or exchange of an interest

"In the case of a sale or exchange of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection wit the sale or exchange of property not associated with partnerships."

Subsections (a) and (b) of § 752 prescribe rules for the treatment of liabilities in transactions between a partner and his partnership, and thus for determining the partner's adjusted basis in his partnership interest. Under § 704(d), a partner's distributive share of partnership losses is limited to the adjusted basis of his partnership interest. 26 U. S. C. § 704(d) (1976 ed., Supp. V); see Perry, Limited Partnerships and Tax Shelters: The *Crane* Rule Goes Public, 27 Tax L. Rev. 525, 543 (1972). When partnership liabilities are increased or when a partner takes on the liabilities of the partnership, § 752(a) treats the amount of the increase or the amount assumed as a contribution by the partner to the partnership. This treatment results in an increase in the adjusted basis of the partner's interest and a concomitant increase in the § 704(d) limit on his distributive share of any partnership loss. Conversely, under § 752(b), a decrease in partnership liabilities or the assumption of a partner's liabilities by the partnership has the effect of a distribution, thereby reducing the limit on the partner's distributive share of the partnership's losses. When property encumbered by liabilities is contributed to or distributed from the partnership, § 752(c) prescribes that the liability shall be considered to be assumed by the transferee only to the extent of the property's fair market value. Treas. Reg. § 1.752–1(c), 26 CFR § 1.752–1(c) (1982).

The legislative history indicates that Congress contemplated this application of § 752(c). Mention of the fair market value limitation occurs only in the context of transactions under subsections (a) and (b).[15] The sole reference to subsection (d) does not discuss the limitation.[16] While the legislative history is certainly not conclusive, it indicates that the fair market value limitation of § 752(c) was directed to transactions between a partner and his partnership.[17] 1 A. Willis, J. Penneil, & P. Postlewaite, Partnership Taxation § 44.03, p. 44–3 (3d ed. 1981); Simmons, *Tufts* v. *Commissioner:* Amount Realized Limited to Fair Market Value, 15 U. C. D. L. Rev. 577, 611–613 (1982).

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[15] "The transfer of property subject to a liability by a partner to a partnership, or by the partnership to a partner, shall, to the extent of the fair market value of such property, be considered a transfer of the amount of

By placing a fair market value limitation on liabilities connected with property contributions to and distributions from partnerships under subsections (a) and (b), Congress apparently intended § 752(c) to prevent a partner from inflating the basis of his partnership interest. Otherwise, a partner with no additional capital at risk in the partnership could raise the § 704(d) limit on his distributive share of partnership losses or could reduce his taxable gain upon disposition of his partner-

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the liability along with the property." H. R. Rep. No. 1337, 83d Cong., 2d Sess., A236 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 405 (1954).

[16] "When a partnership interest is sold or exchanged, the general rule for the treatment of the sale or exchange of property subject to liabilities will be applied." H. R. Rep. No. 1337, at A236–A237; S. Rep. No. 1622, at 405. These Reports then set out an example of subsection (d)'s application, which does not indicate whether the debt is recourse or nonrecourse.

[17] The Treasury Regulations support this view. The Regulations interpreting § 752(c) state:

"Where property subject to a liability is contributed by a partner to a partnership, or distributed by a partnership to a partner, the amount of the liability, to an extent not exceeding the fair market value of the property at the time of the contribution or distribution, shall be considered as a liability assumed by the transferee." § 1.752-1(c), 26 CFR § 1.752-1(c) (1982).

The Regulations also contain an example applying the fair market limitation to a contribution of encumbered property by a partner to a partnership. *Ibid.* The Regulations interpreting § 752(d) make no mention of the fair market limitation. § 752-1(d). Both Regulations were issued contemporaneously with the passage of the statute, T. D. 6175, 1956-1 Cum. Bull. 211, and are entitled to deference as an administrative interpretation of the statute. See *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).

ship interest. See Newman, The Resurgence of Footnote 37: *Tufts* v. *Commissioner*, 18 Wake Forest L. Rev. 1, 16, n. 116 (1982). There is no potential for similar abuse in the context of § 752(d) sales of partnership interests to unrelated third parties. In light of the above, we interpret subsection (c) to apply only to § 752(a) and (b) transactions, and not to limit the amount realized in a sale or exchange of a partnership interest under § 752(d).

IV

When a taxpayer sells or disposes of property encumbered by a nonrecourse obligation, the Commissioner properly requires him to include among the assets realized the outstanding amount of the obligation. The fair market value of the property is irrelevant to this calculation. We find this interpretation to be consistent with *Crane* v. *Commissioner*, 331 U. S. 1 (1947), and to implement the statutory mandate in a reasonable manner. *National Muffler Dealers Assn.* v. *United States*, 440 U. S. 472, 476 (1979).

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I concur in the opinion of the Court, accepting the view of the Commissioner. I do not, however, endorse the Commissioner's view. Indeed, were we writing on a slate clean except for the decision in *Crane* v. *Commissioner*, 331 U. S. 1 (1947), I would take quite a different approach—that urged upon us by Professor Barnett as *amicus*.

Crane established that a taxpayer could treat property as entirely his own, in spite of the "coinvestment" provided by his mortgagee in the form of a nonrecourse loan. That is, the full basis of the property, with all its tax consequences, belongs to the mortgagor. That rule alone, though, does not in any way tie nonrecourse debt to the cost of property or to the proceeds upon disposition. I see no reason to treat the purchase, ownership, and eventual disposition of property differently because the taxpayer also takes out a mortgage, an independent transaction. In this case, the taxpayer purchased property, using nonrecourse financing, and sold it after it declined in value to a buyer who assumed the mortgage. There is no economic difference between the events in this case and a case in which the taxpayer buys property with cash; later obtains a nonrecourse loan by pledging the property as security; still later, using cash on hand, buys off the mortgage for the market value of the devalued property; and finally sells the property to a third party for its market value.

The logical way to treat both this case and the hypothesized case is to separate the two aspects of these events and to consider, first, the ownership and sale of the property, and, second, the arrangement and retirement of the loan. Under *Crane*, the fair market value of the property on the date of acquisition—the purchase price—represents the taxpayer's basis in the property, and the fair market value on the date of disposition represents the proceeds on sale. The benefit received by the taxpayer in return for the property is the cancellation of a mortgage that is worth no more than the fair market value of the property, for that is all the mortgagee can expect to collect on the mortgage. His gain or loss on the disposition of the property equals the difference between the proceeds and the cost of acquisition. Thus, the taxation of the transaction *in property* reflects the economic fate of the *property*. If the property has declined in value, as was the case here, the taxpayer recognizes a loss on the disposition of the property. The new purchaser then takes as his basis the fair market value as of the date of the sale. See, *e. g.*, *United States* v. *Davis*, 370 U. S. 65, 72 (1962); *Gibson Products Co.* v. *United States*, 637 F. 2d 1041, 1045, n. 8 (CA5 1981) (dictum); see generally Treas. Reg. § 1.1001–2(a)(3), 26 CFR § 1.1001–2(a)(3) (1982); 2 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 41.2.2., pp. 41–10—41–11 (1981).

In the separate borrowing transaction, the taxpayer acquires cash from the mortgagee. He need not recognize income at that time, of course, because he also incurs an obligation to repay the money. Later, though, when he is able to satisfy the debt by surrendering property that is worth less than the face amount of the debt, we have a classic situation of cancellation of indebtedness, requiring the taxpayer to recognize income in the amount of the difference between the proceeds of the loan and the amount for which he is able to satisfy his creditor. 26 U. S. C. § 61(a)(12). The taxation of the financing transaction then reflects the economic fate of the loan.

The reason that separation of the two aspects of the events in this case is important is, of course, that the Code treats different sorts of income differently. A gain on the sale of the property may qualify for capital gains treatment, §§ 1202, 1221 (1976 ed. and Supp. V), while the cancellation of indebtedness is ordinary income, but income that the taxpayer may be able to defer. §§ 108, 1017 (1976 ed., Supp. V). Not only does Professor Barnett's theory permit us to accord appropriate treatment to each of the two types of income or loss present in these sorts of transactions, it also restores continuity to the system by making the taxpayer-seller's proceeds on the disposition of property equal to the purchaser's basis in the property. Further, and most important, it allows us to tax the events in this case in the same way that we tax the economically identical hypothesized transaction.

Persuaded though I am by the logical coherence and internal consistency of this approach, I agree with the Court's decision not to adopt it judicially. We do not write on a slate marked only by *Crane*. The Commissioner's longstanding position, Rev. Rul. 76–111, 1976–1 Cum. Bull. 214, is now reflected in the regulations. Treas. Reg. § 1.1001–2, 26 CFR § 1.1001–2 (1982). In the light of the numerous cases in the lower courts including the amount of the unrepaid proceeds of the mortgage in the proceeds on sale or disposition, see, *e. g.*, *Estate of Levine* v. *Commissioner*, 634 F. 2d 12, 15 (CA2 1980); *Millar* v. *Commissioner*, 577 F. 2d 212 (CA3), cert. denied, 439 U. S. 1046 (1978); *Estate of Delman* v. *Commissioner*, 73 T. C. 15, 28–30 (1979); *Peninsula Properties Co., Ltd.* v. *Commissioner*, 47 B. T. A. 84, 92 (1942), it is difficult to conclude that the Commissioner's interpretation of the statute exceeds the bounds of his discretion. As the Court's opinion demonstrates, his interpretation is defensible. One can reasonably read § 1001(b)'s reference to "the amount realized *from* the sale or other disposition of property" (emphasis added) to permit the Commissioner to collapse the two aspects of the transaction. As long as his view is a reasonable reading of § 1001(b), we should defer to the regulations promulgated by the agency charged with interpretation of the statute. *National Muffler Dealers Assn.* v. *United States*, 440 U. S. 472, 488–489 (1979); *United States* v. *Correll*, 389 U. S. 299, 307 (1967); see also *Fulman* v. *United States*, 434 U. S. 528, 534 (1978). Accordingly, I concur.

MARTINEZ, AS NEXT FRIEND OF MORALES *v.* BYNUM, TEXAS COMMISSIONER OF EDUCATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-857. Argued January 10, 1983—Decided May 2, 1983

Texas Education Code § 21.031(d) permits a school district to deny tuition-free admission to its public schools for a minor who lives apart from a "parent, guardian, or other person having lawful control of him" if his presence in the district is "for the primary purpose of attending the public free schools." Petitioner's brother left his parents' home in Mexico to live with petitioner in McAllen, Tex., for the primary purpose of attending school there. When the School District denied her brother's application for tuition-free admission, petitioner, as his next friend, and other custodians of school-age children brought an action in Federal District Court, alleging that § 21.031(d) is unconstitutional on its face. The District Court granted judgment for the defendants, holding that § 21.031(d) was justified by the State's legitimate interests in protecting and preserving the quality of its educational system and the right of its bona fide residents to attend state schools on a preferred tuition basis. The Court of Appeals affirmed.

Held: Section 21.031 is a bona fide residence requirement that satisfies constitutional standards. Pp. 325–333.

(a) A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for the State's residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment nor burden the constitutional right of interstate travel. A bona fide residence requirement simply requires that the person establish residence before demanding the services that are restricted to residents. Moreover, in the public-school context, the fact that provision for primary and secondary education is one of the most important functions of local government is an adequate justification for local residence requirements. Absent such requirements, the proper planning and operation of the schools would suffer significantly. Pp. 325–330.

(b) At the very least, a school district generally would be justified in requiring school-age children or their parents to satisfy the traditional, basic residence criteria—*i. e.*, to live in the district with a bona fide intention of remaining there—before it treated them as residents. See-tion 21.031 not only grants the benefits of residency to all who satisfy the traditional residence definition, but goes further and extends those benefits to many children even if they (or their families) do not intend to remain in the district indefinitely. As long as the child is not living in the district for the sole purpose of attending school, he satisfies the statutory test. Since there is no indication that this extension of the traditional definition has any impermissible basis, it cannot be said that § 21.031(d) violates the Constitution. Pp. 330–333.

648 F. 2d 425, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 333. MARSHALL, J., filed a dissenting opinion, *post*, p. 334.

Edward J. Tuddenham argued the cause and filed briefs for petitioner.

Richard L. Arnett, Special Assistant Attorney General of Texas, argued the cause for respondents. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *C. Ed Davis*.*

JUSTICE POWELL delivered the opinion of the Court.

This case involves a facial challenge to the constitutionality of the Texas residency requirement governing minors who wish to attend public free schools while living apart from their parents or guardians.

I

Roberto Morales was born in 1969 in McAllen, Texas, and is thus a United States citizen by birth. His parents are Mexican citizens who reside in Reynosa, Mexico. He left Reynosa in 1977 and returned to McAllen to live with his sister, petitioner Oralia Martinez, for the primary purpose of at-

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**Robert S. Ogden, Jr.*, and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

David Crump filed a brief for the Texas Association of School Boards e al. as *amici curiae* urging affirmance.

tending school in the McAllen Independent School District. Although Martinez is now his custodian, she is not—and does not desire to become—his guardian.[1] As a result, Morales is not entitled to tuition-free admission to the McAllen schools. Sections 21.031(b) and (c) of the Texas Education Code would require the local school authorities to admit him if he or "his parent, guardian, or the person having lawful control of him" resided in the school district, Tex. Educ. Code Ann. §§21.031(b) and (c) (Supp. 1982), but §21.031(d) denies tuition-free admission for a minor who lives apart from a "parent, guardian, or other person having lawful control of him under an order of a court" if his presence in the school district is "for the primary purpose of attending the public free schools."[2] Respondent McAllen Independent School Dis-

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[1] Section 51.02(4) of the Texas Family Code defines "custodian" as "the adult with whom the child resides." Tex. Fam. Code Ann. §51.02(4) (1975). "Guardian" is defined as "the person who, under court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court." §51.02(3).

[2] Section 21.031 provides, in relevant part:

"(b) Every child in this state . . . who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

"(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons . . . who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

"(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools."

[Footnote 2 is continued on p. 324]

trict therefore denied Morales' application for admission in the fall of 1977.

In December 1977 Martinez, as next friend of Morales, and four other adult custodians of school-age children instituted the present action in the United States District Court for the Southern District of Texas against the Texas Commissioner of Education, the Texas Education Agency, four local School Districts, and various local school officials in those Districts. Plaintiffs initially alleged that § 21.031(d), both on its face and as applied by defendants, violated certain provisions of the Constitution, including the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause. Plaintiffs also sought preliminary and permanent injunctive relief.

The District Court denied a preliminary injunction in August 1978. It found "that the school boards . . . have been more than liberal in finding that certain children are not living away from parents and residing in the school district for the sole purpose of attending school." App. 20a. The evidence "conclusively" showed "that children living within the school districts with someone other than their parents or legal guardians will be admitted to school if *any* reason exists for such situation other than that of attending school only." *Ibid.* (emphasis in original).

Although the "special purpose" test was not codified in § 21.031(d) until 1977, it had been a feature of Texas common law since at least 1905. See, *e. g., De Leon* v. *Harlingen Consolidated Independent School District*, 552 S. W. 2d 922, 924–925 (Tex. Civ. App. 1977); Tex. Atty. Gen. Op. No. H–63, pp. 2–3 (July 12, 1973); Tex. Atty. Gen. Op. No. O–586, pp. 3–4 (May 25, 1939); 1906–1908 Tex. Atty. Gen. Op. 245, 248 (1905). Before 1905 courts in several States had ruled that a child could not acquire residenc for school purposes if his presence in the school district was for the sol purpose of attending school. See, *e. g., Yale* v. *West Middle School Dis trict*, 59 Conn. 489, 491, 22 A. 295, 296 (1890); *State ex rel. School Distric Board* v. *Thayer*, 74 Wis. 48, 58–59, 41 N. W. 1014, 1017 (1889); *Wheeler Burrow*, 18 Ind. 14, 17 (1862); *School District No. 1* v. *Bragdon*, 23 N. H 507, 510, 516 (1851).

Plaintiffs subsequently amended the complaint to narrow their claims. They now seek only "a declaration that . . . §21.031(d) is unconstitutional on its face," *id.*, at 3a, an injunction prohibiting defendants from denying the children admission to school pursuant to §21.031(d), restitution of certain tuition payments,[3] costs, and attorney's fees. App. 3a, 7a. After a hearing on the merits, the District Court granted judgment for the defendants. *Arredondo* v. *Brockette*, 482 F. Supp. 212 (1979). The court concluded that §21.031(d) was justified by the State's "legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis." 482 F. Supp., at 222. In an appeal by two plaintiffs, the United States Court of Appeals for the Fifth Circuit affirmed. 648 F. 2d 425 (1981). In view of the importance of the issue,[4] we granted certiorari. 457 U. S. 1131 (1982). We now affirm.

II

This Court frequently has considered constitutional challenges to residence requirements. On several occasions the Court has invalidated requirements that condition receipt of a benefit on a minimum period of residence within a jurisdiction, but it always has been careful to distinguish such durational residence requirements from bona fide residence requirements. In *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), for example, the Court invalidated one-year durational residence requirements that applicants for public assistance benefits were required to satisfy despite the fact that they otherwise had "met the test for residence in their jurisdictions," *id.*, at 627. Justice Brennan, writing for the Court, stressed that "[t]he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance," *id.*, at 636, and carefully "impl[ied] no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth," *id.*, at 638, n. 21. In *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), the Court similarly invalidated Tennessee laws requiring a prospective voter to have been a state resident for one year and a county resident for three months, but it explicitly distinguished these durational residence requirements from bona fide residence requirements, *id.*, at 334, 337, n. 7, 338, 343, 350, n. 20, 351–352. This was not an empty distinction. Justice Marshall, writing for the Court, again emphasized that "States have the power to require that voters be bona fide residents of the relevant political subdivision." *Id.*, at 343. See also *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 255, 267 (1974) (invalidating one-year durational residence requirement before an applicant became eligible for public medical assistance, but recognizing validity of appropriately defined and uniformly applied bona fide residence requirements).[5]

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[3] Morales attended school in the McAllen School District during the fall, 1978 semester when Texas Rural Legal Aid, Inc., paid his tuition. Bond has been posted to cover subsequent tuition payments.

[4] The vast majority of the States have some residence requirements governing entitlement to tuition-free public schooling. Many States have statutes substantially similar to §21.031(d). See, *e. g.*, Ind. Code §20-8.1-6.1-1(c) (1982); Me. Rev. Stat. Ann., Tit. 20, §859(3)(B)(2) (Supp. 1982); Mass. Gen. Laws Ann., ch. 76, §6 (West 1982); Mich. Comp. Laws §380.1148 (Supp. 1981); Ore. Rev. Stat. §332.595(5) (1981).

We specifically have approved bona fide residence requirements in the field of public education. The Connecticut statute before us in *Vlandis* v. *Kline*, 412 U. S. 441 (1973), for example, was unconstitutional because it created an irrebuttable presumption of nonresidency for state university students whose legal addresses were outside of the State before they applied for admission. The statute violated the Due Process Clause because it in effect classified some bona fide state residents as nonresidents for tuition purposes. But we "fully recognize[d] that a State has a legitimate interest in protecting and preserving . . . the right of its own bona fide residents to attend [its colleges and universities] on a preferential tuition basis." *Id.*, at 452–453. This "legitimate interest" permits a "State [to] establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." *Id.*, at 453–454.[6] Last Term, in *Plyler* v. *Doe*, 457 U. S. 202 (1982), we reviewed an aspect of Tex. Educ. Code Ann.

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[5] In *McCarthy* v. *Philadelphia Civil Service Comm'n*, 424 U. S. 645 (1976) *(per curiam)*, the Court upheld a bona fide continuing-residence requirement. Again, we carefully distinguished this from a durational residence requirement. *Id.*, at 646–647.

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[6] Two years before *Vlandis*, the Court upheld a domicile requirement for resident tuition rates at the University of Minnesota. *Starns* v. *Malkerson*, 401 U. S. 985 (1971), summarily aff'g 326 F. Supp. 234 (Minn. 1970) (three-judge court). The governing regulations declared: "No student is eligible for resident classification in the University . . . unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto. . . . For University purposes, a student does not acquire a domicile in Minnesota until he has been here for at least a year primarily as a permanent resident and not merely as a student; this involves the probability of his remaining in Minnesota beyond his completion of school." 326 F. Supp., at 235–236.

Shortly after *Vlandis*, we upheld a domicile requirement for resident tuition rates at the University of Washington. *Sturgis* v. *Washington*, 414 U. S. 1057, summarily aff'g 368 F. Supp. 38 (WD Wash. 1973) (three-judge court). The relevant statute declared: "The term 'resident student' shall mean a student who has had a domicile in the state of Washington for . . . one year . . . and has in fact established a bona fide domicile in this state for other than educational purposes. . . ." 368 F. Supp., at 39, n. 1. "Domicile" was defined as "a person's true, fixed and permanent home and place of habitation. It is the place where he intends to remain, and to which he expects to return when he leaves without intending to establish a new domicile elsewhere." *Ibid.*

In *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974), we recognized that a one-year residence requirement was consistent with *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Dunn* v. *Blumstein*, 405 U. S. 330

§ 21.031—the statute at issue in this case. Although we invalidated the portion of the statute that excluded undocumented alien children from the public free schools, we recognized the school districts' right "to apply . . . established criteria for determining residence." *Id.*, at 229, n. 22. See *id.*, at 240, n. 4 (POWELL, J., concurring) ("Of course a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection").

A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment.[7] It does not burden or penalize the constitutional right of interstate travel,[8] for any person is free to move to a State and to es-

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(1972), in the context of higher education—despite its durational aspect. 415 U. S., at 259–260, and nn. 12 and 15.

[7] A bona fide residence requirement implicates no "suspect" classification, and therefore is not subject to strict scrutiny. Indeed, there is nothing invidiously discriminatory about a bona fide residence requirement if it is uniformly applied. Thus the question is simply whether there is a rational basis for it.

This view assumes, of course, that the "service" that the State would deny to nonresidents is not a fundamental right protected by the Constitution. A State, for example, may not refuse to provide counsel to an indigent nonresident defendant at a criminal trial where a deprivation of liberty occurs. See *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). As we previously have recognized, however, "[p]ublic education is not a 'right' granted to individuals by the Constitution." *Plyler* v. *Doe*, 457 U. S. 202, 221 (1982) (citing *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 35 (1973)).

[8] The courts below construed § 21.031(d) to apply to children entering a Texas school district not only from other States or countries, but also from other school districts within Texas. 648 F. 2d, at 428; 482 F. Supp., a 222. Thus there are applications of the statute that do not even involv interstate travel, let alone burden or penalize it.

tablish residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents.

There is a further, independent justification for local residence requirements in the public-school context. As we explained in *Milliken* v. *Bradley*, 418 U. S. 717 (1974):

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.*, at 741–742 (quoting *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 50 (1973)).

The provision of primary and secondary education, of course, is one of the most important functions of local government. Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly.[9] The State thus has a substantial interest in

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[9] The Court of Appeals accepted the District Court's findings on the adverse impact that invalidating § 21.031(d) would have on the quality of education in Texas. 648 F. 2d, at 428–429. The District Court explicitly found:

"28. Declaring the statute unconstitutional would cause substantial numbers of int[er]-district transfers, which would . . . cause school populations to fluctuate. . . .

"29. Fluctuating school populations would make it impossible to predict enrollment figures—even on a semester-by-semester basis, causing over-or-under-estimates on teachers, supplies, materials, etc.

"30. The increased enrollment of students would cause overcrowded classrooms and related facilities; over-large teacher-pupil ratios; expansion of bilingual programs; the purchase of books, equipment, supplies and imposing bona fide residence requirements to maintain the quality of local public schools.

III

The central question we must decide here is whether § 21.031(d) is a bona fide residence requirement.[10] Although the meaning may vary according to context, "residence" generally requires both physical presence and an intention to remain.[11] As the Supreme Court of Maine explained over a century ago:

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other customary items of support; all of which would require a substantial increase in the budget of the school districts." 482 F. Supp., at 215.

We do not suggest that findings of this degree of specificity are necessary in every case. But they do illustrate the problems that prompt States to adopt regulations such as § 21.031.

[10] We need not decide whether § 21.031(d) is unconstitutional as applied, for plaintiffs limited their complaint to a facial challenge of this statute. See *supra*, at 325.

We reject the argument that § 21.031(d) violates the Due Process Clause because it creates an irrebuttable presumption of nonresidence. Brief for Petitioner 46–49; see *Vlandis* v. *Kline*, 412 U. S. 441, 446 (1973). Morales easily could rebut any "presumption" of nonresidence if he were, in fact, a resident. See *infra*, at 332, and n. 15; App. 20a.

We also find no merit to the argument that § 21.031(d) constitutes an impermissible burden on children who choose to adopt a nontraditional family-living arrangement. Brief for Petitioner 23–24; see *Moore* v. *East Cleveland*, 431 U. S. 494, 506 (1977) (plurality opinion). Unlike the housing ordinance we invalidated in *Moore* v. *East Cleveland*, the statute before us imposes residence requirements that are justified by substantial state interests on children who live apart from their parents, § 21.031(d), and on children who live with their parents, §§ 21.031(b) and (c); see *Mills* v. *Bartlett*, 377 S. W. 2d 636, 637 (Tex. 1964); *Snyder* v. *Pitts*, 150 Tex. 407, 412–417, 241 S. W. 2d 136, 139–141 (1951); *Whitney* v. *State*, 472 S. W. 2d 524, 525–526 (Tex. Crim. App. 1971); *Harrison* v. *Chesshir*, 316 S. W. 2d 909, 915 (Tex. Civ. App. 1958), rev'd on other grounds, 159 Tex. 359, 320 S. W. 2d 814 (1959) *(per curiam)*; *Prince* v. *Inman*, 280 S. W. 2d 779, 782 (Tex. Civ. App. 1955).

[11] Contrary to the suggestion in the dissent, *post*, at 337–341, we have said nothing about domicile. The Texas statute, like many similar ones, speaks only in terms of residence. We hold simply that a State may impose bona

> "When . . . a person voluntarily takes up his abode in a given place, with intention to remain permanently, or for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence. . . ." *Inhabitants of Warren* v. *Inhabitants of Thomaston*, 43 Me. 406, 418 (1857).

This classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again.[12]

In *Vlandis* v. *Kline*, we approved a more rigorous domicile test as a "reasonable standard for determining the residential status of a student." 412 U. S., at 454. That standard was described as follows: "'In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.'" *Ibid.* (quoting Opinion of the Attorney General of the State of

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fide residence requirements for tuition-free admission to its public schools. Our conclusion is supported by the fact that several States have recognized the "intention to remain" requirement in this context. See, *e. g.*, Conn. Gen. Stat. § 10-253(d) (Supp. 1981); Colo. Rev. Stat. § 22-1-102(2)(g) (1973); Op. No. 76-94, 1975-1976 Biennial Report of the Atty. Gen. of S. D. 660, 662 (1976); Op. No. 2825, 1969-1970 Annual Report & Official Opinions of the Atty. Gen. of S. C. 39, 40 (1970); Op. No. 59-146, 1915-1971 Ariz. Atty. Gen. Reports & Opinions 218, 220 (1959); *In re VanCurran*, 18 Ed. Dept. Rep. 523, 524 (N. Y. Comm'r Educ. 1979). Cf. n. 13, *infra*.

[12] See, *e. g.*, *Kiehne* v. *Atwood*, 93 N. M. 657, 662, 604 P. 2d 123, 128 (1979); *Bullfrog Marina, Inc.* v. *Lentz*, 28 Utah 2d 261, 269-270, 501 P. 2d 266, 272 (1972); *Estate of Schoof* v. *Schoof*, 193 Kan. 611, 614, 396 P. 2d 329, 331-332 (1964); *Hughes* v. *Illinois Public Aid Comm'n*, 2 Ill. 2d 374, 380, 118 N. E. 2d 14, 17 (1954); *Spratt* v. *Spratt*, 210 La. 370, 371, 27 So. 2d 154, 154 (1946); *Appeal of Lawrence County in re Forman*, 71 S. D. 49, 51, 21 N. W. 2d 57, 58 (1945); *Jenkins* v. *North Shore Dye House, Inc.*, 277 Mass. 440, 444, 178 N. E. 644, 646 (1931); *Thomas* v. *Warner*, 83 Md. 14, 20, 34 A. 830, 831 (1896); *Pfoutz* v. *Comford*, 36 Pa. 420, 422 (1860).

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Connecticut Regarding Non-Resident Tuition, Sept. 6, 1972); cf. n. 6, *supra*. This standard could not be applied to school-age children in the same way that it was applied to college students. But at the very least, a school district generally would be justified in requiring school-age children or their parents to satisfy the traditional, basic residence criteria—*i. e.*, to live in the district with a bona fide intention of remaining there[13]—before it treated them as residents.

Section 21.031 is far more generous than this traditional standard. It compels a school district to permit a child such as Morales to attend school without paying tuition if he has a bona fide intention to remain in the school district indefinitely,[14] for he then would have a reason for being there other than his desire to attend school: his intention to make his home in the district.[15] Thus § 21.031 grants the benefits of residency to all who satisfy the traditional requirements. The statute goes further and extends these benefits to many children even if they (or their families) do not intend to remain in the district indefinitely. As long as the child is not living in the district for the sole purpose of attending school, he satisfies the statutory test. For example, if a person comes to Texas to work for a year, his children will be eligible for tuition-free admission to the public schools. See Tr. of Oral Arg. 37. Or if a child comes to Texas for six months for health reasons, he would qualify for tuition-free education. See *id.*, at 31. In short, § 21.031 grants the benefits of residency to everyone who satisfies the traditional residence definition and to some who legitimately could be classified as nonresidents. Since there is no indication that this extension of the traditional definition has any impermissible basis, we certainly cannot say that § 21.031(d) violates the Constitution.

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[13] Of course, the "intention to remain" component of the traditional residency standard does not imply an intention never to leave. Given the mobility of people and families in this country, changing a place of residence is commonplace. The standard accommodates that possibility as long as there is a bona fide present intention to remain. See n. 11, *supra*.

[14] In most cases, of course, it is the intention of the parent or guardian on behalf of the child that is relevant. See *Deterly* v. *Wells*, 53 S. W. 2d 847, 848 (Tex. Civ. App. 1932) (minor presumed to lack capacity to form requisite intention necessary to establish separate domicile). But for convenience we speak of the child's intention.

[15] Respondents have conceded that "the statute permits any child to attend school in a district in which he is present for the purpose of 'establishing a home.'" Brief for Respondents 25. But even if § 21.031(d) could be read to exclude a child who moves to a school district with the intent of making his home there when the desire to make the new home is motivated solely by the desire to attend school, Martinez does not have standing to raise such a claim. The record shows that Morales does *not* intend to make his home in McAllen: the District Court found as a fact that "Morales only intends to reside in the McAllen Independent School District until he completes his education." 482 F. Supp., at 214. He thus fails to satisfy even this most basic criterion of residence.

IV

The Constitution permits a State to restrict eligibility for tuition-free education to its bona fide residents. We hold that § 21.031 is a bona fide residence requirement that satisfies constitutional standards. The judgment of the Court of Appeals accordingly is

Affirmed.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. I write separately, however, to stress that this case involves only a facial challenge to the constitutionality of the Texas statute. *Ante*, at 325 and 330, n. 10. In upholding the statute, the Court does not pass on its validity as applied to children in a range of specific factual contexts. In particular, the Court does not decide whether the statute is constitutional as applied to Roberto Morales, a United States citizen whose parents are nonresident aliens. If this question were before the Court, I believe that a different set of considerations would be implicated which might affect significantly an analysis of the statute's constitutionality.

JUSTICE MARSHALL, dissenting.

Shortly after Roberto Morales reached his eighth birthday, he left his parents' home in Reynosa, Mexico, and returned to his birthplace, McAllen, Tex. He planned to make his home there with his married sister (petitioner) in order to attend school and learn English. Morales has resided with his sister in McAllen for the past five years and intends to remain with her until he has completed his schooling. The Texas statute grants free public education to every school-age child who resides in Texas except for one who lives apart from his parents or guardian for educational purposes. Accordingly, Morales has been refused free admission to the schools in the McAllen district.

The majority upholds the classification embodied in the Texas statute on the ground that it applies only to the class of children who are considered *non*residents. The majority's approach reflects a misinterpretation of the Texas statute, a misunderstanding of the concept of residence, and a misapplication of this Court's past decisions concerning the constitutionality of residence requirements. In my view, the statutory classification, which deprives some children of an education because of their motive for residing in Texas, is not adequately justified by the asserted state interests. Because I would hold the statute unconstitutional on its face under the Equal Protection Clause, I respectfully dissent.

I

At the outset it is important to make clear that the statute upheld by the Court is not the statute actually before us. Petitioner challenges the constitutionality of the classification created by the Texas statutes governing eligibility for admission to the local free schools. Under Texas law, a child who lives in the State may generally attend school where he lives. Tex. Educ. Code Ann. § 21.031(b) (Supp. 1982–1983). This is true whether the child lives with his parents or guardian, or lives apart from them under the care and control of a "custodian," who is a responsible adult other than a parent or guardian to whom the child may or may not be related. Tex. Fam. Code Ann. § 51.02(4) (1975).[1] Section 21.031 creates an exception, however, for children whose "presence in the school district is . . . for the primary purpose of attending the public free schools." § 21.031(d). Those children must reside with "[a] parent, guardian, or other person having lawful control," *ibid.*, to receive free education. If they reside with a custodian, they are denied free public education. *Ibid.*

The Court does not address the constitutionality of the classification contained in the statute. Instead, it upholds as constitutional on its face a statute that denies free public education only to a portion of the children actually described in the Texas statute: children who reside in the State solely for the purpose of attending the local schools *and* who also intend to leave the district after the completion of their education. By inferring that children will not be excluded from the local free schools if they "intend to remain indefinitely" in the district, the Court is able to characterize the Texas statute as imposing a "traditional residency standard." *Ante*, at 332, and n. 13. Having characterized the statute in this fashion, the Court then reasons that because a bona fide residence requirement has been upheld in numerous contexts, the Texas statute is *a fortiori* permissible since it does not deny free education to "resident" children, but only to nonresident children whose presence is motivated by the availability of free education. *Ante*, at 332–333.

By its terms the Texas statute applies to *any* child whose presence in the district is motivated primarily by a desire to obtain free education. The statute draws no further distinction between those who intend to leave upon the completion of their education and those who do not. No Texas court has adopted the narrowing interpretation on which this Court relies.[2] Certainly the manner in which the statute has been applied until now would not support this interpretation.[3] Moreover, the courts below never addressed the question of the constitutionality of this statute as presently interpreted by the majority. It is contrary to the settled practice of this Court to address the constitutionality of a state statute which, as newly interpreted at this late date, has never been considered by a lower court. The proper course in such a situation would be to dismiss the writ of certiorari as improvidently granted, see *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 183 (1959), or to remand for further proceedings. See *Toll* v. *Moreno*, 441 U. S. 458 (1979) *(per curiam)*.

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[1] Although Texas law recognizes the legal ties between a child and his custodian—for example, a custodian may consent to necessary medical treatment for the child and may act on behalf of the child in legal matters, Tex. Fam. Code Ann. §§ 35, 51–54 (1975)—a custodian is not considered an "other person having lawful control of" the child. As a result, only a child who lives in the State for other than educational purposes is permitted to attend public school when he lives with a custodian. Tex. Educ. Code Ann. § 21.031 (Supp. 1982–1983); *infra*, at 343–344.

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[2] The majority apparently recognizes that an "intent to remain" requirement is not implicit in the language of the statute. Compare *ante*, at 330, n. 10, with *ante*, at 330–331, n. 11. An individual's entry into a State for a single purpose has never been considered inconsistent with an intent to remain in the State even after the purpose is accomplished. See n. 10, *infra*. The majority cites in support of its interpretation only the Texas Attorney General's statement to this Court that § 21.031 "permits any child to attend school in a district in which he is present for the [primary] purpose of 'establishing a home.'" Brief for Respondents 25. Unlike the majority, *ante*, at 332, n. 15, I do not understand this to mean that a child who intends to remain indefinitely in the school district will be admitted to school in Texas even if his presence there is for the primary purpose of obtaining an education. I also cannot agree that "[t]he record shows that Morales does *not* intend to make his home in McAllen." *Ibid*. The *record*, which shows that Morales intends to remain in McAllen until he completes his education, is silent as to his intentions after that time. Indeed, what Morales will do in 1987 when he is graduated is most likely a matter of pure speculation even for Morales.

[3] See, *e. g.*, Plaintiffs' Exhibit 8–346 (Application of Rebecca Aguilar, Aug. 22, 1978) (Child, 15 years old, born in McAllen, living with her brother. "Rebecca attended McAllen schools prior to parent's divorce. Parents have since moved to different areas. Rebecca has done very well in school here and would like to continue attending McAllen schools"—admission denied).

The Court nevertheless proceeds to address the constitutionality of the statute as newly interpreted. For the reasons elaborated below, I believe the majority errs in its approach to that question.

II

In the Court's view, because the Texas statute employs a "traditional" residence requirement in a uniform fashion, and indeed is even more generous since it permits some "nonresidents" to obtain free education, the statute need be subjected only to the most minimal judicial scrutiny normally accorded bona fide residence requirements. For the reasons stated below, this conclusion rests on a number of false assumptions and misconceptions. The Court mistakenly equates the Texas statute with a residence requirement, when in fact the statute, as reinterpreted by the Court, imposes a standard even more difficult to meet than a domicile requirement for access to public education. Moreover, even if it were permissible to provide free public education only to those residents who intend to remain in the State, the Texas statute does not impose that restriction uniformly.

A

The majority errs in reasoning that, because "intent to remain indefinitely" in a State is a "traditional" component of many state residence requirements, the imposition of that restriction on free public education is presumptively valid. *Ante*, at 330–333.[4] The standard described by the Court is not the traditional standard for determining residence, but is, if anything, the standard for determining domicile. Although this Court's prior cases suggest that, as a general matter, a State may reserve its educational resources for its residents, there is no support for the view that a State may close its schools to all but *domiciliaries*.

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[4] This Court's past decisions striking down durational residence requirements demonstrate that a statutory scheme does not escape scrutiny simply because it adopts a "traditional" residence requirement as a basis for denying benefits to certain classes of people. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). In *Dunn* v. *Blumstein*, for example, the Court struck down Tennessee's one-year durational residence requirement for voting in state elections, even though such

A difference between the concepts of residence and domicile has long been recognized. See, *e. g., Mitchell* v. *United States*, 21 Wall. 350 (1875); *Penfield* v. *Chesapeake, O. & S. R. Co.*, 134 U. S. 351 (1890); *Texas* v. *Florida*, 306 U. S. 398 (1939). A person is generally a resident of any State with which he has a well-settled connection. "[M]ere lodging or boarding or temporary occupation" is not enough to establish a residence. *Dwyer* v. *Matson*, 163 F. 2d 299, 303 (CA10 1947). See generally Reese & Green, That Elusive Word, "Residence," 6 Vand. L. Rev. 561, 563 (1953). Under the law of Texas, for example, "[r]esidence may be temporary or permanent in nature. However, residence generally requires some condition greater than mere lodging. The term implies a place of abode, albeit temporary, rather than a mere transient lodging." *Whitney* v. *State*, 472 S. W. 2d 524, 525 (Tex. Crim. App. 1971) (citation omitted). See, *e. g., Brown* v. *Boulden*, 18 Tex. 431, 432 (1857); *Travelers Indemnity Co.* v. *Mattox*, 345 S. W. 2d 290, 292 (Tex. Civ. App. 1961); *Prince* v. *Inman*, 280 S. W. 2d 779 (Tex. Civ. App. 1955). "Intent to remain indefinitely" in the State need not be shown in order to be considered a resident of a

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durational requirements had been a traditional component of eligibility for voting in state elections and for many other public privileges. See *Pope* v. *Williams*, 193 U. S. 621 (1904) (upholding one-year durational residence requirement for voting in Maryland elections). Indeed, durational residence requirements continue to be valid for various purposes other than voting. See, *e. g., Sosna* v. *Iowa*, 419 U. S. 393 (1975) (upholding Iowa statutory requirement that a petitioner in a divorce action be a resident of the State for one year preceding the filing of the petition).

State.[5] As the Texas Supreme Court stated in *Snyder* v. *Pitts*, 150 Tex. 407, 413, 241 S. W. 2d 136, 139 (1951), "[f]rom the fact that there can be but one domicile and several residences, we arrive at the conclusion that the element of 'intent to make it a permanent home' is not necessary to the establishment of a second residence away from the domicile."

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[5] The majority erroneously relies on *Inhabitants of Warren* v. *Inhabitants of Thomaston*, 43 Me. 406 (1857), to support its view that "a bona fide intention to remain . . . indefinitely," *ante*, at 332, "has been recognized as [part of] a minimum standard" for establishing residence. *Ante*, at 331. The question in that case was whether a person who had lived and worked in various different towns during the previous five years had established a residence in defendant town for the purposes of state pauper laws. The court indicated that the individual would have acquired a residence if he lived in the town "without any present intention to remove therefrom," 43 Me., at 418, even if he later left the town for extended periods of time. The court did not hold, however, that an individual cannot also establish a residence for the purpose of state pauper laws if he lived in a town with the intent to remain for a fixed, but relatively long period of time. In fact, the court suggested just the opposite when it stated that "[t]o reside is to dwell permanently, *or for a length of time*," *id.*, at 417 (emphasis added). As the Maine Supreme Court stated in *North Yarmouth* v. *West Gardiner*, 58 Me. 207, 211 (1870), "so far as intention is a necessary element of a 'residence,' it will be conclusively inferred from an actual presence accompanied with such circumstances as usually surround a home."

The Court's reliance on various other state decisions, *ante*, at 331, n. 12, is equally misplaced. These cases involve state statutes which expressly incorporate a domicile standard or have been so interpreted by the state courts. These cases do not involve the traditional or common-law concept of residence at all, but involve that term as specifically defined under a particular state statute. For example, in *Estate of Schoof* v. *Schoof*, 193 Kan. 611, 614, 396 P. 2d 329, 331 (1964), the court expressly interpreted the term "residence" to refer to the common-law concept of "domicile" for the purposes of a state statute involving probate of a will, for which one State or county necessarily must be given priority. Similarly, in *Hughes* v. *Illinois Public Aid Comm'n*, 2 Ill. 2d 374, 380–381, 118 N. E. 2d 14, 18 (1954), the court considered a statute which defined a "resident" as one who has "made his or her permanent home in this State for a continuous period of one year." See generally Restatement (Second) of Conflict of Laws § 11, Comment *k* (1971).

On the other hand, an individual has only one domicile, which is generally the State with which he is currently most closely connected, but which may be a State with which he was closely connected in the past. See generally *Williams* v. *North Carolina*, 325 U. S. 226, 229 (1945); *District of Columbia* v. *Murphy*, 314 U. S. 441 (1941); *Williamson* v. *Osenton*, 232 U. S. 619 (1914). Traditionally, an individual has been said to acquire a new domicile when he resides in a State with "the absence of any intention to live elsewhere," *id.*, at 624, or with "'the absence of any present intention of not residing permanently or indefinitely in' the new abode." *Ibid.*, citing A. Dicey, The Conflict of Laws 111 (2d ed. 1908). The concept of domicile has typically been reserved for purposes that clearly require general recognition of a single State with which the individual, actually or presumptively, is most closely connected.[6]

The majority errs in assuming that, as a general matter, States are free to close their schools to all but domiciliaries of the State. To begin with, it is clear that *residence*, not domicile, is the traditional standard of eligibility for lower school education,[7] just as residence often has been used to determine whether an individual is subject to state income tax, whether his property in the State is exempt from attachment, and whether he is subject to jury duty.[8] Moreover, this Court's prior decisions which speak of the constitutionality of a bona fide *residence* standard provide no support for the majority's assumption. Although this Court has referred to a domicile requirement with approval in the context of higher education, it is incumbent upon the State of Texas to demonstrate that the classification transplanted from another statutory scheme is justified by "'*the purposes for which the state desires to use it*.'" *Plyler* v. *Doe*, 457 U. S. 202, 226 (1982), quoting *Oyama* v. *California*, 332 U. S. 633, 664–665 (1948) (Murphy, J., concurring).

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[6] For example, in order to avoid conflicts of laws or jurisdictions, the law of an individual's domicile generally governs such matters as the distribution of his property after death, and the probate of a will and the appointment of an administrator generally occur in the domicile of the deceased. A test requiring both domicile and residence has often been used for purposes of voting, in order to define the group with the greatest interest in the political destiny of the community. See, *e. g.*, *Hershkoff* v. *Board of Registrars of Voters*, 366 Mass. 570, 576–578, 321 N. E. 2d 656, 663 (1974).

Domicile has also been recognized as a basis for exercising personal jurisdiction over a defendant absent from the jurisdiction. *Milliken* v. *Meyer*, 311 U. S. 457 (1940). Moreover, as the majority notes, *ante*, at 327–328, n. 6, this Court has suggested that a domicile requirement may be adopted for determining who may benefit from preferential tuition rates at a state university. *Vlandis* v. *Kline*, 412 U. S. 441, 454 (1973).

[7] See, *e. g.*, *Cline* v. *Knight*, 111 Colo. 8, 137 P. 2d 680 (1943); *Yale* v. *West Middle School District*, 59 Conn. 489, 22 A. 295 (1890); *Ashley* v.

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Even assuming that a State may constitutionally deny free public education to all persons, including residents, who fail to meet the traditional standard for acquiring a domicile, this

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Board of Education, 275 Ill. 274, 114 N. E. 20 (1916); *Mt. Hope School District* v. *Hendrickson*, 197 Iowa 191, 197 N. W. 47 (1924); *Township of Mancelona* v. *Township of Custer*, 236 Mich. 677, 211 N. W. 60 (1926); *McNish* v. *State, ex rel. Dimick*, 74 Neb. 261, 104 N. W. 186 (1905); *Lisbon* v. *Landaff*, 75 N. H. 324, 74 A. 186 (1909); *People ex rel. B. C. A. Soc.* v. *Hendrickson*, 54 Misc. 337, 104 N. Y. S. 122 (Sup. Ct. 1907); *Board of Education* v. *Hobbs*, 8 Okla. 293, 56 P. 1052 (1899); *I. O. O. F.* v. *Board of Education*, 90 W. Va. 8, 110 S. E. 440 (1922); *State* v. *Thayer*, 74 Wis. 48, 41 N. W. 1014 (1889).

[8] Residence has also been used to determine eligibility for public benefits other than education. See, *e. g.*, *Town of Winchester* v. *Town of Burlington*, 128 Conn. 185, 188, 21 A. 2d 371, 373 (1941) (pauper statutes); *North Yarmouth* v. *West Gardiner*, 58 Me. 207 (1870) (pauper statutes); *Ortman* v. *Miller*, 33 Mich. App. 451, 190 N. W. 2d 242 (1971) (Michigan Motor Vehicles Accident Fund); *State ex rel. Timo* v. *Juvenile Court of Wadena County*, 188 Minn. 125, 246 N. W. 544 (1933) (poor relief); *Collins* v. *Yancey*, 55 N. J. Super. 514, 522, 151 A. 2d 68, 73 (1959) (Unsatisfied Claim and Judgment Fund Law); *Baldwin* v. *Tiffany*, 250 N. Y. 489, 166 N. E. 177 (1929) (treatment in state mental hospital); *Adams County* v. *Burleigh County*, 69 N. D. 780, 787, 291 N. W. 281, 285 (1940) (pauper laws); *Jamaica* v. *Townshend*, 19 Vt. 267 (1847) (pauper laws).

is not what the Texas statute does. Section 21.031(d) operates to deny public education to some persons who meet the traditional standard. As interpreted by the Court, the Texas statute denies free public education to any child who intends to leave the district at some point in the future. Yet such an intention does not preclude an individual from being considered a domiciliary under the prevailing conception of domicile.

When a person lives in a single geographical area, which is the center of his domestic, social, and civil life, that place has all the indicia of his domicile, and will generally be so regarded irrespective of his intent to make a home somewhere else in the distant future.[9]

> "A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist Church who is settled for two years may surely make his home for two years with his flock, although he means, at the end of that period, to remove and gain another." Report of the Committee on Elections re *Cessna* v. *Meyers*, H. R. Rep. No. 11, 42d Cong., 2d Sess., 3 (1872).

Thus, the majority is surely incorrect when it states that an individual who intends to leave the district as many as 10 years later cannot possibly satisfy general domicile requirements. *Ante*, at 330, n. 10.[10]

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[9] See, *e. g.*, *Hawes* v. *Club Ecuestre El Commandante*, 598 F. 2d 698, 701–702 (CA1 1979); *Pedigo* v. *Grimes*, 113 Ind. 148, 13 N. E. 700 (1887); *Brittenham* v. *Robinson*, 18 Ind. App. 502, 48 N. E. 616 (1897); *Paulson* v. *Forest City Community School Dist.*, 238 N. W. 2d 344, 349 (Iowa 1976); *Hershkoff* v. *Board of Registrars of Voters*, *supra*, at 578–579, 321 N. E. 2d, at 664; *Robbins* v. *Chamberlain*, 297 N. Y. 108, 75 N. E. 2d 617 (1947); *Lloyd* v. *Babb*, 296 N. C. 416, 444, 251 S. E. 2d 843, 861 (1979); *Jamaica* v. *Townshend*, *supra*. See generally Restatement (Second) of Conflict of Laws §§ 11–12, 18 (1971); H. Goodrich, Conflict of Laws 35–36 (1927); R. Leflar, American Conflicts Law § 10 (3d ed. 1977).

C

Even if it were permissible to deny free education to residents who expect to leave the State at some future date, the statute could not escape constitutional scrutiny because it does not apply this test uniformly. Under Tex. Educ. Code Ann. § 21.031 (Supp. 1982–1983), the public free schools of Texas are generally open to any child who is a resident of the State. Admission is not limited to residents who intend to remain indefinitely in Texas. See *Brownsville Independent School Dist.* v. *Gamboa*, 498 S. W. 2d 448, 450 (Tex. Civ. App. 1973).[11] As the Attorney General of Texas explained in

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[10] An individual's motive for entering a State, while evidence of whether he intends to make his home there, is also not conclusive in determining whether that individual is a domiciliary of the State. Assuming that an individual has otherwise satisfied the general requirements for acquiring a domicile in a State, "it is immaterial what motives led the person to go there. It makes no difference whether these motives were good or bad or, more specifically, whether the move to the new location was for purposes of health, to accept a job, to avoid taxation, to secure a divorce, to bring suit in the federal courts or even to facilitate a life of sin or crime." Restatement (Second) of Conflict of Laws § 18, Comment *f* (1971). See, *e. g.*, *Young* v. *Pollak & Co.*, 85 Ala. 439, 5 So. 279 (1888). An individual who has otherwise satisfied the state domicile requirements has traditionally been entitled to take advantage of the particular state benefits which motivated his change of domicile. See, *e. g.*, *Williamson* v. *Osenton*, 232 U. S. 619, 625 (1914); *Jones* v. *League*, 18 How. 76, 81 (1855); *Schultz* v. *Chicago City Bank & Trust Co.*, 384 Ill. 148, 51 N. E. 2d 140 (1943); *Cooper* v. *Cooper*, 217 N. W. 2d 584 (Iowa 1974); *McConnell* v. *Kelley*, 138 Mass. 372 (1885); *Nichols* v. *Nichols*, 538 S. W. 2d 727 (Mo. App. 1976). Thus, under the traditional criteria for acquiring a domicile, an individual would not be denied a public education solely because he entered the State for the purpose of attending its local schools.

[11] In *Brownsville Independent School Dist.* v. *Gamboa*, the Texas court considered whether a School District had improperly excluded two children who claimed that they were eligible to attend the local free schools under Tex. Educ. Code Ann. § 21.031, prior to the amendment of that provision in 1977 to add subsection (d). One child, an American citizen by reason of

Plyler v. *Doe*, 457 U. S., at 227, n. 22, "if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools." Thus, under § 21.031, "[t]he State provides free public education to all lawful residents whether they intend to reside permanently in the State or only reside in the State temporarily." 457 U. S., at 240, n. 4 (POWELL, J., concurring). The only exception is children who live apart from their parents or legal guardians for educational purposes. Those children, unlike all others, must intend to remain indefinitely in a particular school district in the State in order to attend its schools.

Because the intent requirement is applied to only one class of children, it cannot be characterized as a bona fide residence requirement. As the majority recognizes, *ante*, at 328, a State may not pick and choose among classes of state inhabitants to decide which will be subject to particularly difficult or preclusive eligibility standards. This premise underlies decisions striking down state statutes which create a presumption that particular classes of individuals are not residents because of either where they live in the State, see *Evans* v. *Cornman*, 398 U. S. 419 (1970), or what jobs they hold. See *Carrington* v. *Rash*, 380 U. S. 89 (1965).[12] This

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birth in Texas, had lived in Mexico since infancy with parents who were Mexican citizens. At the age of six he left his parents' home and came to live with his maternal aunt in Brownsville for the purpose of attending the public free schools. He lived in his aunt's home as part of her household for 16 months with only a single brief interruption. She was appointed the child's guardian. The court concluded from this that "[t]here is sufficient permanency in the plaintiff's residence status within the defendant's district to satisfy the statutory requirement" of residence. 498 S. W. 2d, at 450.

[12] In *Carrington* v. *Rash*, for example, the Court held that the Equal Protection Clause was violated by a Texas constitutional provision that no serviceman may acquire a voting residence in the State so long as he remains in the service. We stated that the State may not conclusively presume that members of a particular profession are transient inhabitants, but

principle was reaffirmed last Term in *Plyler* v. *Doe* which struck down provisions of Tex. Educ. Code Ann. § 21.031 (Supp. 1982–1983) which denied a free public education to undocumented school-age children. The State of Texas defended the alienage classification as a mere residence requirement. This Court rejected the assertion because the provisions excluded undocumented children who "comply with the established standards by which the State historically tests residence." 457 U. S., at 227, n. 22. We observed that while the State is "as free to apply to undocumented children established criteria for determining residence as [it is] to apply those criteria to any other child who seeks admission," the State's classification will not escape constitutional scrutiny merely because it "defin[es] a disfavored group as nonresident." *Ibid.*

III

I continue to believe that, in analyzing a classification under the Equal Protection Clause, the appropriate level of scrutiny depends on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 99 (1973) (MARSHALL, J., dissenting). It has become increasingly clear that the approach actually taken in our cases focuses "upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge* v. *Williams*, 397 U. S. 471, 520–521 (1970) (MARSHALL, J., dissenting). See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982); *Plyler* v. *Doe*, *supra; Zobel* v.

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must instead apply the "more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote," just as it applies those tests to all others seeking to vote in the State. 380 U. S., at 95.

Williams, 457 U. S. 55 (1982). In my view, § 21.031 cannot withstand the careful scrutiny that I believe is warranted under the Equal Protection Clause.

A

The majority reasons that because § 21.031 imposes a bona fide residence requirement in a uniform fashion, it is *ipso facto* constitutional. As the foregoing has demonstrated, § 21.031 is neither a bona fide residence requirement nor one which is uniformly applied to all school-age children living in Texas. Quite the contrary, § 21.031 denies free public education to some persons who satisfy the traditional tests not only of residence but also of domicile. In my view § 21.031 should be subjected to careful judicial scrutiny.

The interest adversely affected by § 21.031, a child's education, is one which I continue to regard as fundamental. See *San Antonio Independent School District* v. *Rodriguez*, 411 U. S., at 110–117 (MARSHALL, J., dissenting). The fundamental importance of education is reflected in "the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." *Id.*, at 111 (MARSHALL, J., dissenting). Last Term's decision in *Plyler* v. *Doe*, 457 U. S., at 221–223, is the most recent decision of this Court to recognize the special importance of education. See also *id.*, at 234 (BLACKMUN, J., concurring) ("[W]hen the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with [many of the] purposes . . . of the Equal Protection Clause"). Therefore, simply on the ground that § 21.031 significantly impedes access to education,[13] I would subject the statutory classification to careful scrutiny.[14]

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[13] That the statute may not, in all cases, absolutely preclude a child from attaining an education is, of course, irrelevant. See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982).

[14] Careful scrutiny is particularly appropriate because the classification burdens a child's right to reside in the State, which is an element of the

B

The Texas statute is not narrowly tailored to achieve a substantial state interest. The State of Texas does not attempt to justify the classification by reference to its interest in the safety and well-being of children within its boundaries. The State instead contends that the principal purpose of the classification is to preserve educational and financial resources for those most closely connected to the State. *Ante*, at 329–330, n. 9.[15] The classification of children according to

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constitutional right to travel. *Edwards* v. *California*, 314 U. S. 160, 183 (1941) (Jackson, J., concurring). See generally *Zobel* v. *Williams*, 457 U. S. 55, 66–68 (1982) (BRENNAN, J., concurring); *id.*, at 76–77 (O'CONNOR, J., concurring). We have made clear in the past that the right to travel includes the right to reside in the State in order to take advantage of particular state benefits. On its face, a classification based upon a person's motive for residing in the State burdens that right. Thus, in striking the durational residence requirement for welfare benefits at issue in *Shapiro* v. *Thompson*, this Court specifically rejected as illegitimate a State's purported interest in "discourag[ing] those indigents who would enter the State solely to obtain larger benefits," 394 U. S., at 631. The Court stated:

> "[F]undamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. *Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.*" *Id.*, at 631–632 (emphasis added).

See also *Memorial Hospital* v. *Maricopa County*, 415 U. S., at 263. Cf. *Doe* v. *Bolton*, 410 U. S. 179, 200 (1973).

[15] "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. . . . [A] State may 'not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools.'" *Plyler* v. *Doe*, 457 U. S., at 227, 229, quoting *Shapiro* v. *Thompson*, 394 U. S., at 633.

their motive for residing in the State cannot be justified as a narrowly tailored means of limiting public education to children "closely connected" with the State. Under the Texas scheme, some children who are "residents" of the State in every sense of that word are nevertheless denied an education. Other children whose only connection with the State is their physical presence are entitled to free public education as long as their presence is not motivated by a desire to obtain a free education. A child residing in the State for *any other reason*, no matter how ephemeral, will receive a free education even if he plans to leave before the end of the school year. Whatever interest a State may have in preserving its educational resources for those who have a sufficiently close connection with the State, that interest does not justify a crude statutory classification which grants and withholds public education on a basis which is related only in a haphazard way to the extent of that child's connection with the State. Cf. *Plyler* v. *Doe*, *supra*, at 227.

For similar reasons, the statute is not carefully designed to reserve state resources only for those who will have the most enduring connection with the State.[16] As a general matter, the State concededly enrolls "school-age children [who intend] to remain only six months" in Texas. *Plyler* v. *Doe*, *supra*, at 227, n. 22. For example, "if a child comes to Texas for six months for health reasons, he would qualify for tuition-free education." *Ante*, at 333. Yet the State excludes from its schools a child who enters the district at the age of seven with the intent to remain for at least 10 more years in order to complete his education.

The State also seeks to justify §21.031(d) as a means of preventing undesirable fluctuations in the student population from year to year. *Ante*, at 329, n. 9. The classification of students based on their motive for residing in the State cannot be justified on this basis. To begin with, Texas may not rely on a vague, unsubstantiated fear that, in the absence of a barrier to migration, children throughout the State and from outside the State will leave their parents and relocate within Texas solely to attend the school of a particular district, and that they will do so in numbers that are wholly unpredictable. There is no evidence whatsoever that the migration of school-age children in unpredictable numbers has caused administrative problems, and the mere conjecture that such problems would arise in the absence of § 21.031(d) cannot be the basis for upholding a classification that singles out some children who reside in the State and denies them a public education. Cf. *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 268–269 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618, 634–635 (1969).[17]

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[16] I have some doubt whether, beyond a certain point, a State may distinguish between its residents based on the length of time that they are likely to remain in the State. Cf. *Zobel* v. *Williams*, *supra*.

Moreover, even if such evidence were available, § 21.031 cannot be justified as a means of preventing interdistrict migration of students whose parents live in Texas, since the provision was not enacted with that general problem in mind. See *Schlesinger* v. *Ballard*, 419 U. S. 498, 520 (1975) (BRENNAN, J., dissenting); *McGinnis* v. *Royster*, 410 U. S. 263, 270 (1973) (the challenged classification must further "some legitimate, *articulated* state purpose") (emphasis added). As the Court of Appeals of Texas acknowledged, "§ 21.031(d) was enacted in response to litigation regarding the rights of *alien* children to attend Texas schools." *Jackson* v. *Waco Independent School Dist.*, 629 S. W. 2d 201, 205 (1982) (emphasis added). Indeed, § 21.031(d) is not needed to redress the problems caused by interdistrict migration, since school districts have authority quite apart from that provision for requiring students to attend the school in the district within the State in which their parents reside. *Ibid.*, citing Tex. Educ. Code Ann. § 23.26 (1972). Because "the statutory provisions at issue were shaped by forces other than" a general concern with student migration within the State, *Trimble* v. *Gordon*, 430 U. S. 762, 775 (1977), that broad concern cannot provide a basis for upholding the statute. Rather, to the extent that concern over fluctuations in student populations underlies § 21.031(d), it must be a concern over the migration into Texas of children from other States and from other countries. There is simply no basis for concluding, however, that interstate migration has or will cause serious problems related to fluctuations in the number of students in each school district.[18]

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[17] On its face, the claim that many students will leave their parents' homes solely to move to a more attractive school district within the State is implausible. One may assume that, as a general rule, parents have a significant interest in living with their children, and that the difficulty of finding a custodian who will make a home for their child would create a practical impediment even for those parents willing to part with their children.

Finally, whatever the magnitude of the problems associated with fluctuations in the student population because of migration from without the State, the motive requirement of § 21.031(d) is simply not narrowly tailored to further the state interest in minimizing fluctuations. Just as there is nothing to suggest that the number of children who enter Texas for educational purposes will vary significantly from year to year, there is certainly nothing to suggest that their number will vary to a greater extent than the number who enter for all other purposes. Moreover, once children enter the State for educational purposes, they are likely to be the among the most stable members of the school-age population. It is by definition a matter of primary importance to such children that they remain in the district until they complete their schooling. All other children, to whom attending the local schools is a matter of comparative unimportance, may have little tie to the State or to a particular district within the State during their school years. Indeed, under the Texas statute a child who resides in the State for any purpose other than to attend the local schools is entitled to free education even if he expressly intends to remain for less than a year. Yet a child who resides in the State in order to attend its schools is denied an education even if he intends to remain until he has completed 12 full years of primary and secondary education. This disparate treatment cannot be justified by any alleged state concern over fluctuating student populations.

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[18] Respondents place considerable reliance on a study of student migration from Mexico that was undertaken shortly before enactment of § 21.031. J. Hensley, The Impact of Students From Mexico Upon Selected School Districts in Texas Counties Adjacent to the Mexican Border (1976). Superintendents of 22 Texas school districts nearest the Mexican border were interviewed. Nearly 75% agreed that increases in enrollment by immigrant students were primarily attributable to economic factors such as the availability of jobs in the United States, rather than to educational factors. *Id.*, at 80. Over 80% found that the increases in enrollment were not unexpected. *Id.*, at 75. No inquiry was conducted into the number of children living apart from their parents or guardian for the purpose of attending school.

IV

For the foregoing reasons, I reject the majority's conclusion that the Texas statute may be upheld on the ground that it is far more generous than a traditional residence requirement for public education. To the contrary, the statute is less generous since it excludes a class of children who ordinarily would be regarded as Texas residents. Because I believe that the State has not adequately justified its denial of public education to one small class of school-age residents, I would hold that § 21.031(d) violates the Equal Protection Clause. I therefore dissent.

KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1320. Argued November 8, 1982—Decided May 2, 1983

A California statute requires persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held: The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 355–361.

658 F. 2d 1362, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 369.

A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *George Deukmejian*, Attorney General, *Robert H. Philibosian*, Chief Assistant Attorney General, *Daniel J.*

Kremer, Assistant Attorney General, and *Jay M. Bloom*, Deputy Attorney General.

Mark D. Rosenbaum, by invitation of the Court, 459 U. S. 964, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief were *Dennis M. Perluss*, *Fred Okrand*, *Mary Ellen Gale*, *Robert H. Lynn*, and *Charles S. Sims*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1 (1968).[1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated

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*Briefs of *amici curiae* urging reversal were filed by *William L. Cahalan*, *Edward Reilly Wilson*, and *Timothy A. Baughman* for the Wayne County Prosecutor's Office; and by *Wayne W. Schmidt*, *James P. Manak*, and *Fred E. Inbau* for Americans for Effective Law Enforcement, Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Eugene G. Iredale* for the California Attorneys for Criminal Justice; and by *Michael Ratner* for the Center for Constitutional Rights.

Briefs of *amici curiae* were filed by *John K. Van de Kamp*, *Harry B. Sondheim*, and *John W. Messer* for the Appellate Committee of the California District Attorneys Association; by *Dan Stormer*, *John Huerta*, and *Peter Schey* for the National Lawyers Guild et al.; and by *Quin Denvir* and *William Blum* for the State Public Defender of California.

[1] California Penal Code Ann. § 647(e) (West 1970) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to Cal. Penal Code Ann. § 647(e) (West 1970).[2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that § 647(e) is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that § 647(e) was overbroad because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good-faith belief that each detention or arrest was lawful.

Appellant H. A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson cross-appealed, arguing that he was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of § 647(e). 658 F. 2d 1362 (1981). The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

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[2] The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under § 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266–267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. *Id.*, at 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647(e).

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared § 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to 28 U. S. C. § 1254(2). 455 U. S. 999 (1982).

II

In the courts below, Lawson mounted an attack on the facial validity of § 647(e).[3] "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494, n. 5 (1982). As construed by the California Court of Appeal,[4] § 647(e) requires that an individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention.[5] *People* v. *Solomon*, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867

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[3] The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See *Steffel* v. *Thompson*, 415 U. S. 452 (1974). Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e). See *Ellis* v. *Dyson*, 421 U. S. 426, 434 (1975).

[4] In *Wainwright* v. *Stone*, 414 U. S. 21, 22–23 (1973), we held that "[f]or the purpose of determining whether a state statute is too vague and indefi-

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nite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 273 (1940)." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People* v. *Solomon*, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), that the State Supreme Court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of § 647(e). See 658 F. 2d 1362, 1364–1365, n. 3 (1981).

[5] The *Solomon* court apparently read *Terry* v. *Ohio*, 392 U. S. 1 (1968), to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry*, the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U. S., at 21. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[w]e believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." 658 F. 2d, at 1366, n. 8. We agree with that interpretation of *Solomon*. Of course, if the *Solomon* court misread *Terry* and interpreted § 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, Fourth Amendment concerns would be implicated. See *Brown* v. *Texas*, 443 U. S. 47 (1979).

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry*. See 33 Cal. App. 3d, at 435, 108 Cal. Rptr., at 870–871. The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." 658 F. 2d, at 1366, n. 9. The court reasoned that under *Terry*, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

(1973). "Credible and reliable" identification is defined by the State Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.*, at 438, 108 Cal. Rptr., at 873. In addition, a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." *Id.*, at 438, 108 Cal. Rptr., at 872. Under the terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest.[6]

III

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc., supra; Smith* v. *Goguen*, 415 U. S. 566 (1974); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U. S., at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*, at 575.[7]

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[6] In *People* v. *Caylor*, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497, 501 (1970), the court suggested that the State must prove that a suspect detained under § 647(e) was loitering or wandering for "evil purposes." However, in *Solomon*, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

Section 647(e), as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 90 (1965). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties . . . ." *Id.*, at 91. In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement. See *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505–506 (1964).[8]

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[7] Our concern for minimal guidelines finds its roots as far back as our decision in *United States* v. *Reese*, 92 U. S. 214, 221 (1876):

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

[8] In his dissent, JUSTICE WHITE claims that "[t]he upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally

Section 647(e) is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." *Solomon*, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872–873. In addition, the suspect may also have to account for his presence "to the extent it assists in producing

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protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Post*, at 370. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). Second, where a statute imposes criminal penalties, the standard of certainty is higher. See *Winters* v. *New York*, 333 U. S. 507, 515 (1948). This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See, *e. g.*, *Colautti* v. *Franklin*, 439 U. S. 379, 394–401 (1979); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment . . . ." *Post*, at 371. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Post*, at 370. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e. g.*, *Keyishian* v. *Board of Regents*, 385 U. S. 589, 609 (1967); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 110–113 (1960).

No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on *Parker* v. *Levy*, 417 U. S. 733 (1974), but in that case we deliberately applied a less stringent vagueness analysis "[b]ecause of the factors differentiating military society from civilian society." *Id.*, at 756. *Hoffman Estates*, *supra*, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected, see 455 U. S., at 494, 495, 498–499, the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." *Id.*, at 499, 498.

credible and reliable identification." *Id.*, at 438, 108 Cal. Rptr., at 872.

At oral argument, the appellants confirmed that a suspect violates § 647(e) unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him,[9] or could satisfy the identification requirement simply by reciting his name and address. See *id.*, at 6–10.

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith, supra*, at 575 (quoting *Gregory* v. *Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" *Papachristou*, 405 U. S., at 170 (quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis* v. *City of New Orleans*, 415 U. S. 130, 135 (1974) (POWELL, J., concurring in result). In providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, 443

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[9] To the extent that § 647(e) criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis* v. *Mississippi*, 394 U. S. 721, 727, n. 6 (1969).

U. S., at 51. Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939). Section 647(e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see *United States* v. *Petrillo*, 332 U. S. 1, 7–8 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

IV

We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.[10] Accordingly, the judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

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[10] Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See *Burton* v. *United States*, 196 U. S. 283, 295 (1905); *Liverpool, N. Y. & P. S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). See also *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). The remaining issues raised by the parties include whether § 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal

It is so ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, Cal. Penal Code Ann. § 647(e) (West 1970), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth Amendment.[1] Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

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statute creates other vagueness problems. The appellee also argues that § 647(e) permits arrests on less than probable cause. See *Michigan* v. *DeFillippo*, 443 U. S. 31, 36 (1979).

[1] We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron* v. *New York*, 392 U. S. 40, 61 (1968). In *Sibron*, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles* v. *Lyons*, *ante*, at 105–109; *Gomez* v. *Layton*, 129 U. S. App. D. C. 289, 394 F. 2d 764 (1968). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See *Davis* v. *Mississippi*, 394 U. S. 721, 726–727 (1969). The scope of that exception to the probable-cause requirement for seizures of the person has been defined by a series of cases, beginning with *Terry* v. *Ohio*, 392 U. S. 1 (1968), holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, *e. g.*, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880–884 (1975); *Adams* v. *Williams*, 407 U. S. 143, 145–146 (1972). Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway* v. *New York*, 442 U. S. 200, 214 (1979).[2]

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[2] A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare *Dunaway* v. *New York*, 442 U. S., at 212–216 (seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment), and *Davis* v. *Mississippi*, 394 U. S. 721, 727–728 (1969) (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time),

Terry and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The *Terry* doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. *Terry* v. *Ohio*, *supra*, at 19, n. 16; see *Florida* v. *Royer*, 460 U. S. 491, 498–499 (1983) (opinion of WHITE, J.); *United States* v. *Mendenhall*, 446 U. S. 544, 554 (1980) (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, pp. 53–55 (1978). Our case reports are replete with examples of suspects' cooperation during *Terry* encounters, even when the suspects have a great deal to lose by cooperating. See, *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 45 (1968); *Florida* v. *Royer*, *supra*, at 493–495.

The price of that effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the Fourth Amendment. See *Terry* v. *Ohio*, 392 U. S., at 16. For precisely that reason, the scope of seizures of the person on less than probable cause that *Terry*

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with *Michigan* v. *Summers*, 452 U. S. 692, 701–705 (1981) (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant supported by probable cause). See also *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

permits is strictly circumscribed to limit the degree of intrusion they cause. *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

> "[T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34 (WHITE, J., concurring).

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See *Florida* v. *Royer*, 460 U. S., at 501 (opinion of WHITE, J.); *id.*, at 509–511 (BRENNAN, J., concurring in result); *Dunaway* v. *New York*, *supra*, at 216.

The power to arrest—or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers—would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, *e. g.*, *Brown* v. *Texas*, 443 U. S. 47, 52 (1979). But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See *Dunaway* v. *New York*, *supra; United States* v. *Brignoni-Ponce*, 422 U. S., at 878. Detention beyond the limits of *Terry* without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of *Terry* encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157–168 (1968).

In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions.[3] They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest.[4]

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a

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[3] Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, *e. g.*, ALI Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

[4] Of course, some reactions by individuals to a properly limited *Terry* encounter, *e. g.*, violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that which the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

Terry encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that § 647(e) advances any interest other than general facilitation of police investigation and preservation of public order—factors addressed at length in *Terry*, *Davis*, and *Dunaway*. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18–19 (asserting that § 647(e) is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and *People* v. *Solomon*, 33 Cal. App. 3d 429, 436–437, 108 Cal. Rptr. 867, 872 (1973) (§ 647(e) justified by "the public need involved," *i. e.*, "protection of society against crime"), with *United States* v. *Brignoni-Ponce*, *supra*, at 884 (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and *California* v. *Byers*, 402 U. S. 424, 456–458 (1971) (Harlan, J., concurring in judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by *Terry*, the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction have a substantial impact on interests protected by the Fourth Amendment, far more severe than we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of § 647(e) will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in *Brown* v. *Texas*, 443 U. S. 47 (1979), in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion.[5] If § 647(e) remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see *ante*, at 354. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion"—without which they may not demand identification even under § 647(e), *ante*, at 356, and n. 5—because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see *Terry* v. *Ohio*, 392 U. S., at 30; *United States* v. *Brignoni-Ponce*, 422 U. S., at 884–885. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution.[6] The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma.[7]

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[5] In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry*, when the police have reasonable suspicion but not probable cause. See 443 U. S., at 53, n. 3.

[6] Even after arrest, however, he may not be forced to answer questions against his will, and—in contrast to what appears to be normal procedure during *Terry* encounters—he will be so informed. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. *Id.*, at 473–474.

By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if § 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g.*, *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975); *United States* v. *Powell*, 423 U. S. 87, 92–93 (1975). If the actor is given sufficient notice that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 497 (1982).

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[7] When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," *Parker* v. *Levy*, *supra*, at 756; a "greater degree of specificity" is demanded than in other contexts. *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974). But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." *Parker* v. *Levy*, 417 U. S., at 756. It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid*. Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante*, at 358–359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to *Parker* v. *Levy*, *supra*.

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations. See, *e. g.*, *Hoffman Estates*, *supra*, at 504. It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." *Hoffman Estates* v. *Flipside*, *supra*, at 495.* But the statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

> "It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." *Smith* v. *Goguen*, 415 U. S., at 584 (WHITE, J., concurring in judgment).

See *id.*, at 590 (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here

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*The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. 455 U. S., at 499–500.

implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Ante*, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972), involved a statute that made it a crime to be a "vagrant." The statute provided:

> "'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" *Id.*, at 156–157, n. 1.

In *Lewis* v. *City of New Orleans*, 415 U. S. 130, 132 (1974), the statute at issue made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis* v. *City of New Orleans* and *Smith* v. *Goguen*, *supra*, as well as other cases cited by the majority clearly involved threatened infringements of First Amendment freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened is never mentioned. *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965), is cited, but that case dealt with an ordinance making it a crime to "'stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" *id.*, at 90, and the First Amendment concerns implicated by the statute were adequately explained by the Court's reference to *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938), and *Schneider* v. *State*, 308 U. S. 147 (1939), which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment—and I express no views about that question—the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

ARKANSAS ELECTRIC COOPERATIVE CORP. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

APPEAL FROM THE SUPREME COURT OF ARKANSAS

No. 81-731. Argued January 17, 1983—Decided May 16, 1983

Appellant is a customer-owned rural power cooperative established with loan funds and technical assistance provided by the federal Rural Electrification Administration (REA), but unlike most such cooperatives, which provide power directly to consumers, appellant's sole members and primary customers are 17 smaller Arkansas rural power cooperatives which in turn serve the ultimate consumer. Although tied into an interstate "grid" arrangement with other producers, appellant obtains most of its energy from powerplants located in Arkansas, which it wholly or partially owns, and sells most of what it generates to its member cooperatives. Appellee Arkansas Public Service Commission entered an order asserting jurisdiction over the wholesale rates charged by appellant to its member cooperatives, concluding that state regulation was neither forbidden by *Public Utilities Comm'n of R. I.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83—which held that while consistent with the Commerce Clause the States could regulate retail sales of electricity, they could not regulate wholesale sales—nor pre-empted by the Federal Power Act or the Rural Electrification Act of 1936. On review, the Pulaski County Circuit Court set aside appellee's order, but the Arkansas Supreme Court reversed.

Held:

1. Appellee's assertion of jurisdiction over the wholesale rates charged by appellant to its members does not offend the Supremacy Clause of the Constitution. Pp. 383–389.

(a) Neither the Federal Power Act nor administrative actions taken thereunder pre-empt state regulation. The Federal Power Commission determined in 1967 that it did not have jurisdiction under the Act over the wholesale rates charged by rural power cooperatives under the supervision of the REA, and such decision was based on the Commission's conclusion that the relevant statutes gave the REA exclusive authority among federal agencies to regulate rural power cooperatives, not on a conclusion that, as a matter of policy, such cooperatives that are engaged in sales for resale should be left unregulated. Pp. 383–385.

(b) The Rural Electrification Act does not expressly pre-empt state rate regulation of power cooperatives financed by the REA, and the legislative history of the Act establishes that, although the REA was expected to assist the fledgling rural power cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes. In addition, the REA's present policy is wholly inconsistent with pre-emption of state regulatory jurisdiction over wholesale rates. Pp. 385–389.

2. Appellee's assertion of regulatory jurisdiction over wholesale rates does not offend the Commerce Clause. Pp. 389–395.

(a) If the mechanical wholesale/retail test articulated in *Attleboro*, *supra*, were applied here, it would require setting aside appellee's assertion of jurisdiction. However, the general trend in this Court's modern Commerce Clause jurisprudence is to look in every case to the nature of the state regulation involved, the State's objective, and the effect of the regulation upon the national interest in the commerce involved, and that modern jurisprudence, rather than the mechanical line drawn in *Attleboro*, must govern the decision here. Pp. 389–393.

(b) "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142. Economic protectionism is not implicated here, and state regulation of the wholesale rates charged by appellant to its members is well within the scope of "legitimate local public interests," particularly considering that although appellant is tied into an interstate grid, its basic operation consists of supplying power from generating facilities located within the State to member cooperatives, all of which are located within the State. Although appellee's regulation of appellant's rates charged to its members will have an incidental effect on interstate commerce, "the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits." Pp. 393–395.

273 Ark. 170, 618 S. W. 2d 151, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 396.

Robert D. Cabe argued the cause for appellant. With him on the brief was *Leland F. Leatherman*.

Jeff Broadwater argued the cause for appellee. With him on the brief was *Robert H. Wood, Jr.**

**Wallace F. Tillman* filed a brief for the National Rural Electric Cooperative Association as *amicus curiae* urging reversal.

Paul Rodgers filed a brief for the National Association of Regulatory Utility Commissioners as *amicus curiae* urging affirmance.

JUSTICE BRENNAN delivered the opinion of the Court.

This appeal requires us to decide whether the Arkansas Public Service Commission (PSC) acted contrary to the Commerce Clause or the Supremacy Clause of the Constitution when it asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member retail distributors, all of whom are located within the State. The Arkansas Supreme Court upheld the PSC's assertion of jurisdiction. We affirm.

I

Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. See *Munn* v. *Illinois*, 94 U. S. 113 (1877). On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests. See *FERC* v. *Mississippi*, 456 U. S. 742, 755–757 (1982); *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 339 (1982).

This dilemma came into sharp focus for this Court early in this century in a series of cases construing the restrictions imposed by the Commerce Clause on state regulation of the sale of natural gas. Our solution was to fashion a bright line dividing permissible from impermissible state regulation. See *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 309 (1924); *Public Utilities Comm'n for Kan.* v. *Landon*, 249 U. S. 236 (1919); cf. *Pennsylvania Gas Co.* v. *Public Service Comm'n of N. Y.*, 252 U. S. 23 (1920). Simply put, the doctrine of these cases was that the retail sale of gas was subject to state regulation, "even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies," *Missouri* v. *Kansas Gas Co., supra*, at 309, but that the wholesale sale of gas in interstate commerce was not subject to state regulation even though some of the gas being sold was produced within the State. Our rationale was that "[t]ransportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce," 265 U. S., at 307, but that "[w]ith the delivery of the gas to the distributing companies . . . the interstate movement ends" and the further "effect on interstate commerce, if there be any, is indirect and incidental," *id.*, at 308. See also, *e. g.*, *State Corporation Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 563–564 (1934); *East Ohio Gas Co.* v. *Tax Comm'n of Ohio*, 283 U. S. 465, 470–471 (1931).

The wholesale/retail line drawn in *Landon* and *Kansas Gas* was applied to electric utilities in *Public Utilities Comm'n of R. I.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). *Attleboro* involved an attempt by the Rhode Island Public Utilities Commission to regulate the rates at which the Narragansett Electric Lighting Co.—a Rhode Island utility—could sell electric current to a Massachusetts distributor. We struck down the regulation, holding that, because it involved a transaction at wholesale, it imposed a "direct" rather than an "indirect" burden on interstate commerce. In doing so we held that it was immaterial "that the general business of the Narragansett Company appears to be chiefly local," *id.*, at 90, or that the State Commission grounded its assertion of jurisdiction on the need to facilitate the regulation of the company's retail sales to its Rhode Island customers.

As a direct result of *Attleboro* and its predecessor cases, Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce, and created the Federal Power Commission (FPC) (now the Federal Energy Regulatory Commission) (FERC) to carry out that task. See Federal Power Act of 1935 (Title II of the Public Utility Act of 1935), 49 Stat. 838–863; Natural Gas Act of 1938, 52 Stat. 821.[1] Although the main purpose of this legislation was to "'fill the gap'" created by *Attleboro* and its predecessors, see *New England Power Co.* v. *New Hampshire, supra,* at 340; *United States* v. *Public Utilities Comm'n of California,* 345 U. S. 295, 311 (1953), it nevertheless shifted this Court's main focus—in determining the permissible scope of state regulation of utilities—from the constitutional issues that concerned us in *Attleboro* to analyses of legislative intent.[2] For example, in *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498 (1942), we were required to determine whether the sale of natural gas by an Illinois pipeline corporation to local distributors in Illinois was subject to the jurisdiction of the Federal Power Commission or the Illinois Commerce Commission. We began our analysis by describing the wholesale/retail test drawn in *Landon, Kansas Gas, Attleboro,* and other cases. We then noted another line of cases—relating to both utility regulation and other Commerce Clause issues—in which the Court was "less concerned to find a point in time and space where the interstate commerce . . . ends and intrastate commerce begins, and . . . looked [instead] to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." 314 U. S., at 505. We stated:

> "In the absence of any controlling act of Congress, we should now be faced with the question whether the interest of the state in the present regulation of the sale and distribution of gas transported into the state, balanced against the effect of such control on the commerce in its

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[1] See *FPC* v. *Southern California Edison Co.,* 376 U. S. 205 (1964), and *United States* v. *Public Utilities Comm'n of California,* 345 U. S. 295 (1953), for discussions of the relevant legislative history.

[2] But cf., *e. g., New England Power Co.* v. *New Hampshire,* 455 U. S. 331 (1982).

> national aspect, is a more reliable touchstone for ascertaining state power than the mechanical distinctions on which appellee relies." *Id.*, at 506.

We concluded, however, that we were "under no necessity of making that choice here," *ibid.*, for Congress, partly to avoid "drawing the precise line between state and federal power by the litigation of particular cases," *id.*, at 507, had adopted the "mechanical" line established in *Kansas Gas* and *Attleboro* as the statutory line dividing federal and state jurisdiction.[3]

The analysis in *Illinois Gas* was reaffirmed in subsequent cases and extended to similar jurisdictional disputes arising under the Federal Power Act. See, *e. g., Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Ind.*, 332 U. S. 507, 517 (1947) ("The line of the statute was . . . clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses"); *United States* v. *Public Utilities Comm'n of California, supra*, at 308 ("Congress interpreted *[Attleboro]* as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power") (footnote omitted); *FPC* v. *Southern California Edison Co.*, 376 U. S. 205 (1964). The last of these cases is particularly noteworthy for our purposes here, for it held, among other things, that under the *Attleboro* test, a California utility that received some of its power from out-of-state was subject to federal and not state regulation in its sales of electricity to a California municipality that resold the bulk of the power to others. See also *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453 (1972).

II

AECC is one of a large number of customer-owned rural power cooperatives established with loan funds and technical assistance provided by the federal Rural Electrification Administration (REA) in order to bring electric power to parts of the country not adequately served by commercial utility companies. See generally Rural Electrification Act of 1936, 49 Stat. 1363, 7 U. S. C. § 901 *et seq.* (1976 ed. and Supp. V). Unlike most rural power cooperatives, however, AECC does not provide power directly to individual consumers. Rather, its sole members and primary customers are 17 smaller Arkansas rural power cooperatives who in turn serve the ultimate consumer. AECC is governed by a Board of Directors consisting of 34 persons, 2 designated by each of the 17 member cooperatives. Among the duties of this Board is to determine the rates charged the member cooperatives by AECC.

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[3] We make no attempt in this opinion to trace the subsequent development of these statutes, except as may be relevant to our decision today.

AECC obtains most of its energy from a number of powerplants located in Arkansas, which it wholly or partially owns. Moreover, it sells most of what it generates to its member cooperatives. Like most electric utilities, however, AECC also participates in a variety of sale and exchange arrangements with other producers, buying power when its own need or the excess capacity of other utilities is high, and selling it when the opposite is the case. By virtue of these arrangements, AECC is ultimately tied into a multicompany and multistate "grid," and, electricity being what it is, see *FPC* v. *Florida Power & Light Co., supra,* it is difficult to say with any confidence that the power AECC provides to its member cooperatives at any particular moment originated entirely within the State.

The retail rates charged by AECC's member cooperatives are regulated by the Arkansas PSC. If AECC were not a rural power cooperative, the wholesale rates it charges to its members would, under the scheme we described in Part I, *supra,* be subject exclusively to federal regulation. See § 201(b) of the Federal Power Act, 49 Stat. 838, 847, as amended, 16 U. S. C. § 824(b) (1976 ed., Supp. V); *FPC* v. *Southern California Edison Co., supra; FPC* v. *Florida Power & Light Co., supra.* In 1967, however, the FPC held that it had no jurisdiction under the Federal Power Act to regulate wholesale rates charged by rural power cooperatives under the supervision of the REA. *Dairyland Power Cooperative*, 37 F. P. C. 12, 67 P. U. R. 3d 340.[4] Thus, until the proceedings that culminated in this case, the rates charged by AECC to its member cooperatives were not subject, at either the federal or the state level, to the type of pervasive rate regulation almost universally associated with electric utilities in this country.[5]

In 1979, after public hearings, the Arkansas PSC entered an order asserting jurisdiction over the rates charged by AECC to its member cooperatives. The PSC based its decision on the same Arkansas statutes that authorize its regulation of rural power cooperatives engaged in retail sales of electricity. App. 52–53; see Ark. Stat. Ann. §§ 73–201(a), 73–202(a), 73–202.1 (1979). In response to objections raised by AECC, the PSC held that state regulation was neither forbidden by *Attleboro* or *FPC* v. *Southern California Edison Co.*, *supra*, nor pre-empted by the Federal Power Act or the Rural Electrification Act. On review, the Pulaski County Circuit Court set aside the PSC's order, but the Arkansas Supreme Court reversed and upheld the jurisdiction of the PSC. 273 Ark. 170, 618 S. W. 2d 151 (1981). We noted probable jurisdiction. 457 U. S. 1130 (1982).

In its brief on the merits, AECC presses both the Commerce Clause and the pre-emption arguments rejected by the Arkansas PSC.[6] We consider the statutory argument first.

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[4] The United States Court of Appeals for the District of Columbia Circuit reached the same conclusion in *Salt River Project Agricultural Improvement & Power District* v. *FPC*, 129 U. S. App. D. C. 117, 391 F. 2d 470 (1968). But cf. n. 7, *infra*.

[5] We discuss *infra*, at 385–388, the role of the REA in regulating the rates set by rural electric cooperatives. We also note *infra*, at 394, the argument that AECC, because it is owned and directly managed by its 17 principal customers, is essentially self-regulating.

[6] There is a legitimate question in this case as to whether the pre-emption argument advanced by AECC is properly before us. AECC's jurisdic-

III

The basic principles governing the pre-emption of state regulation by federal law are well known. See *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525–526 (1977). In this case, we are concerned with the possible preemptive effects of two federal statutes and administrative acts taken pursuant to them: the Federal Power Act and the Rural Electrification Act.

A

As we discuss *supra*, at 381–382, the FPC determined in 1967 that it did not have jurisdiction under the Federal Power Act over the wholesale rates charged by rural power cooperatives.[7] That does not dispose of the possibility that

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tional statement raised only the pure Commerce Clause issue, and did not offer pre-emption as a separate ground for reversal. Only after the United States, as *amicus curiae*, relied strongly on a pre-emption argument did AECC devote considerable attention to it in its brief on the merits. Nevertheless, the relationship between legislative and judicial enforcement of the Commerce Clause is close enough for the pre-emption issue to come, if by the barest of margins, within those "subsidiary question[s] fairly included" in the principal question on appeal. See this Court's Rule 15.1(a); *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U. S. 87, 94, n. 9 (1982); *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 371, n. 4 (1967). See also *Vance* v. *Terrazas*, 444 U. S. 252, 258, n. 5 (1980).

A more serious, because jurisdictional, problem was raised by AECC's counsel's statement at oral argument that, although the pre-emption issue was raised before the Arkansas PSC, it may not have been raised before the Arkansas Supreme Court. Tr. of Oral Arg. 8. As it turns out, however, the pre-emption argument *was* raised, if half-heartedly, both in AECC's petition for review in the Pulaski County Circuit Court, Record 104, and in its brief in the Arkansas Supreme Court, Brief for Appellee in No. 80–313, pp. 16–17.

[7] Neither party here has challenged the correctness of that determination, and we express no opinion on the subject. Were FERC or the courts ever definitively to overrule *Dairyland Power Cooperative*, 37 F. P. C. 12, 67 P. U. R. 3d 340 (1967), and decide that the FPC did have jurisdiction, we would obviously be faced with a very different pre-emption question.

the Federal Power Act pre-empts state regulation, however, because a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate. See *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971); cf. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, *supra*, at 155. In this case, however, nothing in the language, history, or policy of the Federal Power Act suggests such a conclusion. Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one.[8] Moreover, the FPC's refusal in 1967 to assert jurisdiction over rural power cooperatives does not suggest anything to the contrary. In that decision, the FPC simply held that, purely as a jurisdictional matter, the relevant statutes gave the REA exclusive authority among federal agencies to regulate rural power cooperatives. *Dairyland Power Cooperative*, 37 F. P. C., at 26, 67 P. U. R. 3d, at 352–354. It did not determine that, as a matter of policy, rural power cooperatives that are engaged in sales for resale should be left unregulated.[9] Indeed, the

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[8] As the dissent suggests, Congress in 1935 almost certainly thought that state regulation of the wholesale activities of rural power cooperatives operating in interstate commerce would be barred under this Court's *Attleboro* doctrine. Cf. *infra*, at 389–390. To the extent that Congress sought to freeze its perception of *Attleboro* into law, however, it did so only as a means to accomplishing the end of workable federal regulation, not as an end in itself. If we start from the premise that Congress did not intend to subject rural power cooperatives to the federal regulatory scheme it was creating in the 1935 legislation, see n. 7, *supra*, then it would not have served Congress' purposes to pre-empt state regulation over such cooperatives. Significantly, the dissent does not put forward any argument to the contrary.

[9] Similarly, although the Court of Appeals opinion in *Salt River Project Agricultural Improvement & Power District* v. *FPC*, *supra*, did suggest in its initial description of rural power cooperatives that they were effectively self-regulating as to rates, *id.*, at 120, 391 F. 2d, at 473, its conclusions of

FPC's published opinion concluded by specifically urging Congress to amend the statute and grant it jurisdiction over at least some of the activities of such utilities. *Id.*, at 28, 67 P. U. R. 3d, at 355. We therefore find no bar to the PSC's assertion of jurisdiction either in the Federal Power Act itself or in the FPC's *Dairyland* decision.

B

We turn then to the REA. Nothing in the Rural Electrification Act expressly pre-empts state rate regulation of power cooperatives financed by the REA. Nevertheless, AECC and certain of the *amici*, including the United States, argue that the PSC's assertion of jurisdiction interferes with the REA's pervasive involvement in the management of the rural power cooperatives to which it loans funds, and may frustrate important federal interests. As the United States expresses this position in its brief:

> "The terms and conditions of a loan to a generation and transmission association [such as AECC] require the borrower's rates and rate structure to be approved by the REA, not just at its inception, but throughout the term of the loan. And in passing on rate questions, the REA considers, not only the security thus afforded for payment of the loan, but also the suitability of the rates and structure to the Act's underlying purpose of facilitating the availability of cheap electric power in rural America.
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> . . . . .
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> "The spectre of state regulation poses a threat to the REA loan because of the possibility that the state may refuse to permit its cooperatives to pay a generation and transmission association the rates to which they agreed

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law upholding the FPC's refusal to take jurisdiction were grounded fundamentally on considerations of interagency jurisdiction.

> and upon the security of which the loan was issued. Moreover, the policy behind the Rural Electrification Act is at stake. . . . [T]he REA has always encouraged its borrowers to establish affordable rates for all of its subscribers. In this way, costs are shared in a manner which, over the long run, benefits all by the creation of a sound, extensive rural electric system. If the state were to insist on a restructuring of the generation and transmission association's rate structure, the policies of the Act would be undermined." Brief for United States as *Amicus Curiae* 12–13.

As the United States and AECC admit, the REA is a lending agency rather than a classic public utility regulatory body in the mold of either FERC or the Arkansas PSC. This case might therefore present the interesting question of how we should in general define the proper relationship between the requirements established by federal lending agencies and the more direct regulatory activities of state authorities. We need not examine the issue at that level of abstraction, however, because we have quite specific indications of congressional and administrative intent on precisely the question before us. Cf. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S., at 159, n. 14.

First, the legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes.[10] See, *e. g.*, 80 Cong. Rec. 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., 30, 37, 51, 52 (1936). Admittedly, the legislative record focuses on *retail* rates charged by rural power cooperatives, but with respect to the particular concerns that AECC and *amici* have pressed in support of pre-emption, we can discern no relevant difference between wholesale and retail rates: both types of rates implicate the Government's interest in securing its loans, and, if anything, retail rates more directly implicate the Government's interest in assuring that individual rural households receive electricity at a reasonable price.[11]

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[10] All this is not to say that officials of the REA have always welcomed state regulation of rural power cooperatives, or thought it was a good idea. See, *e. g.*, REA, Rural Electrification on the March, pp. 25–26 (1938). But, of course, such expressions of opinion do not constitute sufficient grounds for pre-emption.

Second, the present published policy of the REA is wholly inconsistent with pre-emption of state regulatory jurisdiction. Although generating cooperatives dealing with the REA must obtain the agency's approval whenever they modify their wholesale rates,[12] the same document setting out guidelines for what constitute proper wholesale rates also states: "Borrowers must, of course, submit proposed rate changes to any regulatory commissions having jurisdiction and must seek approval in the manner prescribed by those commissions." REA Bulletin 111–4, pp. 1–2 (1972).[13] Since Bulletin 111–4 was issued subsequent to the FPC's decision in *Dairyland*, the "regulatory commissions having jurisdiction" to which it refers can only be state regulatory agencies such as the Arkansas PSC.[14] Moreover, it is worth noting that the REA's supervision of wholesale rates charged by its borrowers appears to be no more exclusive than its supervision over their retail rates, REA Bulletin 112–2 (1971); REA Bulletin 112–1, pp. 1, 16 (1979), and it has never been contended that state regulatory jurisdiction over those rates is pre-empted, see REA Bulletin 112–2, at 5; Brief for United States as *Amicus Curiae* 11.[15]

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[11] Contrary to the suggestion in the dissent, we do not infer from this legislative history that Congress either "authorized" or "expected" "state regulation that this Court had barred States from engaging in." *Post*, at 400. See n. 15, *infra;* n. 8, *supra*. The relevant inquiry, however, is not whether Congress authorized or expected such regulation, but whether it intended by its own actions to *forbid* it. Cf. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, *ante*, p. 190. In answering that question, we look quite naturally to whether Congress intended in any way to forbid state regulation of rural power cooperatives.

[12] How well this oversight works in practice may be another matter. See REA Bulletin 111-1, Memorandum from REA Administrator to All REA Electric Borrowers, Managers, and Board Presidents (Mar. 18, 1970) (complaining that some borrowers had neglected to obtain the necessary review and approval by the REA). As the United States admits in its brief, "the REA does not control the rates and rate structure of . . . generation and transmission associations as thoroughly or with the formality of the Federal Power Commission." Brief for United States as *Amicus Curiae* 12.

There may come a time when the REA changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural Electrification Act, it would of course pre-empt any further exercise of jurisdiction by the Arkansas PSC. See *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 171–172 (1978); cf. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S., at 154; *Free* v. *Bland*, 369 U. S. 663, 668 (1962). Similarly, as Arkansas already recognizes, see Ark. Stat. Ann. § 73–202.3 (1979), the PSC can make no regulation affecting rural power cooperatives which conflicts with particular regulations promulgated by the REA. Moreover, even without an explicit statement from the REA, a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act. See *Jones* v. *Rath Packing Co.*, 430 U. S., at 525–526, 540–543; cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 231–232 (1947). We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all. *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 130–131 (1978). See generally *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware, Inc.*, 414 U. S. 117, 136–140 (1973).

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[13] See also REA Bulletin 3–1, p. 1 (1955) ("It is the responsibility of borrowers . . . to initiate and carry forward proceedings before regulatory bodies of appropriate jurisdiction in which all required certificates of convenience and necessity, franchises, and rate, tariff and other approvals are sought").

[14] The dissent faults us for finding significance in REA Bulletin 111–4. *Post*, at 400–401. In particular, it speculates that "the statement [in Bulletin 111–4] could have been intended [only] to direct wholly *intrastate* cooperatives to comply with the orders of state commissions." *Post*, at 401 (emphasis added). It is our understanding, however, that, as of 1972, all the generating cooperatives in the country, except perhaps those in Texas, were tied into an interstate grid. If this is true, it is unlikely that the REA would have used as broad and unqualified language as it did for the sole purpose of directing cooperatives in one State to submit to state regulation.

[15] In light of our discussion in text, an argument might be made that state rate regulation of rural power cooperatives engaged in sales for resale is not only not pre-empted, but is indeed affirmatively authorized by the Rural Electrification Act. Cf. *Western & Southern Life Insurance Co.* v. *Board of Equalization*, 451 U. S. 648, 652–653 (1981); *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 423–426 (1946). On balance, however, it seems most likely that Congress and the REA intended no more than to leave in place state regulation otherwise consistent with the requirements of the Commerce Clause. See *New England Power Co.* v. *New Hampshire*, 455 U. S., at 341; *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 49 (1980).

IV

A

Even in the absence of congressional legislation, "the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Insurance Co.* v. *Board of Equalization*, 451 U. S. 648, 652 (1981) (footnote omitted). If the constitutional rule articulated in *Attleboro* were applied in this case, it would require setting aside the PSC's assertion of jurisdiction over AECC, since AECC, like the utility in *Attleboro*, sells at wholesale electric energy transmitted in interstate commerce.[16] As we pointed out in *Illinois Gas*, however, see *supra*, at 379–380, it is difficult to square the mechanical line drawn in *Attleboro* and its predecessor cases, and based on a supposedly precise division between "direct" and "indirect" effects on interstate commerce, with the general trend in our modern Commerce Clause jurisprudence to look in every case to "the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." 314 U. S., at 505. Cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). This modern jurisprudence has usually, although not always, given more latitude to state regulation than the more categorical approach of which *Attleboro* is one example. But in any event, it recognizes, as *Attleboro* did not, that there is an "infinite variety of cases, in which regulation of local matters may also operate as a regulation of [interstate] commerce, [and] in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 768–769 (1945). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456 (1981); *Pike* v. *Bruce Church, Inc.*, *supra*, at 142; *Parker* v. *Brown*, 317 U. S. 341, 362–363 (1943).

We are faced, then, in this case, with precisely the question left open in *Illinois Gas:* Do we follow the mechanical test set out in *Attleboro*, or the balance-of-interests test applied in our Commerce Clause cases for roughly the past 45 years? Of course, the principle of *stare decisis* counsels us, here as elsewhere, not lightly to set aside specific guidance of the sort we find in *Attleboro*. Nevertheless, the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time. Thus, in recent years, this Court has explicitly abandoned a series of formalistic distinctions—akin to the one in *Attleboro*—which once both defined and controlled various corners of Commerce Clause doctrine. See, *e. g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981) (abandoning rule that constitutionality of state severance tax depended on whether it was imposed on goods prior to their entry into interstate commerce); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (rejecting rule, based on legal fiction of ownership, that States had absolute control over disposition of wild animals within their borders); *Washington Revenue Dept.* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734 (1978) (rejecting rule that tax on stevedoring automatically constituted an impermissible "direct" tax on interstate commerce); cf. *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976) (overruling "original package" rule in Import-Export Clause doctrine).

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[16] It is possible to distinguish *Attleboro* on its facts, since it was concerned with the sale of power by a company in one State to a wholesale customer in another State. Nevertheless, it is much more difficult to dismiss the broad principle articulated in *Attleboro* and its predecessor cases, especially in light of the reading given to those cases in our subsequent decisions. See, *e. g.*, *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504, 508 (1942); *FPC* v. *Southern California Edison Co.*, 376 U. S., at 212, 214.

The wholesale/retail line drawn in *Attleboro* is no less anachronistic than the rules we rejected in the cited cases. Moreover, we have had no occasion, since the 1930's, either to apply that line or to reject it in a case not governed by statute. The difficulty of harmonizing *Attleboro* with modern Commerce Clause doctrine has been apparent for a long time, so much so that we expressed skepticism about its continuing soundness as a constitutional, rather than statutory, rule in *Illinois Gas*. Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence. See *New England Power Co.* v. *New Hampshire*, 455 U. S. 331 (1982); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U. S. 329, 336–337 (1951). Finally, we can see no strong reliance interests that would be threatened by our rejection today of the mechanical line drawn in *Attleboro*. Therefore, here, as in few other contexts, the burden shifts somewhat to the party defending the rule to show why it should be applied in this case.

AECC makes essentially two arguments, in the course of its brief and oral argument, for why *Attleboro* should govern here. First, it contends that the constitutional import of the *Attleboro* line was reaffirmed in *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, which was decided in 1964. This claim is simply wrong. *Southern California Edison Co.* did no more than interpret the Federal Power Act, and it cited with approval the constitutional agnosticism spelled out at length in *Illinois Gas*. See 376 U. S., at 214.

Second, AECC argues that, although "[t]he Attleboro line of cases established an admittedly mechanical test for determining the limitation of state power, . . . the court arrived at that test by careful consideration of what was national importance as opposed to what was essentially local and could be, therefore, regulated by the states," Tr. of Oral Arg. 11, and that nothing that has happened since has changed that implicit balance. This contention is also unpersuasive. Even if we assume—as is not necessarily the case, see *supra*, at 390—that the underlying substantive concerns motivating the Court to strike down the state regulation in *Attleboro* were identical to the considerations articulated in our more recent cases, that in itself does not explain why the bright-line test drawn in *Attleboro* should be applied to the somewhat different set of facts present here, see n. 16, *supra*. Bright lines are important and necessary in many areas of the law, including constitutional law. Moreover, *Southern California Edison Co.* and other cases have made it clear that the Federal Power Act draws a bright line between the respective jurisdictions of federal and state regulatory agencies. Nevertheless, AECC has given us no good reason why a bright line between state regulation and *unexercised* federal power is more justifiable here than in other contexts in which we must interpret the negative implications of the Commerce Clause.

Attleboro and its predecessors are by no means judicial atrocities, plainly wrong at the time they were decided. In the first place, it is not entirely insignificant, quite apart from the sort of statutory analysis in which we engaged in Part III, *supra*, that those cases were decided in a day before Congress had already spoken with some breadth on the subject of utility regulation. Cf. *Duckworth* v. *Arkansas*, 314 U. S. 390, 400 (1941) (Jackson, J., concurring in result). This Court was in 1927 the sole authority safeguarding federal interests over a wide range of state utility regulation. Under those circumstances, drawing a fairly restrictive bright line may have made considerable sense. Indeed, the line the Court drew in *Attleboro*, though by no means perfect, would undoubtedly lead in a large number of cases to results entirely consistent with present-day doctrine. Second, the judicial turn of mind apparent in *Attleboro*, although problematic in many respects, can also be a healthy counterweight in many contexts to an otherwise too-easy dilution of guarantees contained in the Constitution. Nevertheless, *Attleboro* can no longer be thought to provide the sole standard by which to decide this case, and we proceed instead to undertake an analysis grounded more solidly in our modern cases.

B

Illinois Gas cited as examples of the less formalistic approach to the Commerce Clause such now-classic cases as *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1938), and *Duckworth* v. *Arkansas*, *supra*. One recent reformulation of the test established in those cases is found in *Pike* v. *Bruce Church, Inc.*:

> "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on inter-

> state commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U. S., at 142 (citation omitted).

Applying the *Bruce Church* test to this case is relatively simple. The most serious concern identified in *Bruce Church*—economic protectionism—is not implicated here. Compare *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), with *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S., at 471–472. Moreover, state regulation of the wholesale rates charged by AECC to its members is well within the scope of "legitimate local public interests," particularly considering that although AECC is tied into an interstate grid, its basic operation consists of supplying power from generating facilities located within the State to member cooperatives, all of which are located within the State. Cf. *id.*, at 473, n. 17.

An argument could be made that, because AECC's Board of Directors consists exclusively of representatives of its 17 customers, it is effectively self-regulating, and that therefore any state regulation is not supported by an appreciable state interest. Cf. *Salt River Project Agricultural Improvement & Power District* v. *FPC*, 129 U. S. App. D. C. 117, 120, 391 F. 2d 470, 473 (1968). Nevertheless, there is evidence that even cooperative power utilities may engage in economically inefficient behavior, see generally R. Schmalensee, The Control of Natural Monopolies 91–93 (1979), and sources cited, and we will not under these circumstances second-guess the State's judgment that some degree of governmental oversight is warranted. See *Clover Leaf Creamery Co.*, *supra*, at 469, 473; *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 128.[17]

Finally, although we recognize that the PSC's regulation of the rates AECC charges to its members will have an incidental effect on interstate commerce, we are convinced that "the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits." Part of the power AECC sells is received from out-of-state. But the same is true of most *retail* utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States. Similarly, it is true that regulation of the prices AECC charges to its members may have some effect on the price structure of the interstate grid of which AECC is a part. But, again, we find it difficult to distinguish AECC in this respect from most relatively large utilities which sell power both directly to the public and to other utilities. It is not inconceivable that a particular rate structure required by the Arkansas PSC would be so unreasonable as to disturb appreciably the interstate market for electric power. But, as we said in our discussion of the pre-emption issue, see *supra*, at 389, we are not willing to allow such a hypothetical possibility to control this facial challenge to the PSC's mere assertion of regulatory jurisdiction. See *Exxon Corp.* v. *Governor of Maryland*, *supra*, at 128–129.

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[17] Note also that the Arkansas PSC's regulation of AECC's rates can be justified, if on no other grounds, as facilitating its regulation of the retail rates charged by AECC's members: The PSC's inquiry into the reasonableness of those retail rates must already include an inquiry into the reasonableness of the wholesale rates upon which they in part depend. Moreover, if the retail rates are found unreasonable (by virtue of the wholesale rates being unreasonable), it seems likely that the retail cooperatives will, through their representatives on AECC's Board of Directors, vote for a reduction in the wholesale rates. Regulating AECC's rates directly allows the PSC both to rationalize and to streamline this process, and also to obtain the necessary information directly from its source.

V

On this record, the PSC's assertion of jurisdiction over the wholesale rates charged by AECC to its members offends neither the Supremacy Clause nor the Commerce Clause. The judgment of the Arkansas Supreme Court is

Affirmed.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

I respectfully dissent. I believe that state regulation of rural cooperative wholesale power rates is pre-empted because Congress has occupied the field of wholesale power rate regulation.

Several years before the expansion of the jurisdiction of the Federal Power Commission to regulate interstate wholesale power rates, this Court had invalidated as repugnant to the Commerce Clause state attempts to regulate interstate power wholesale rates. *Public Utilities Comm'n of R. I.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). The Court drew a bright line demarking the permissible scope of state regulation. States could regulate retail sales of energy in interstate commerce, but could not regulate wholesale sales of energy in interstate commerce. "*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce." *United States* v. *Public Utilities Comm'n of Cal.*, 345 U. S. 295, 304 (1953). Had there been at the time of *Attleboro* a cooperative that generated electricity and sold it for resale across state lines, state regulation of such sales would have been foreclosed as an interference with commerce. I do not see how that conclusion could be questioned.

Nor is it sensible to argue that such a cooperative's rates became subject to state regulation when a few years later Congress subjected to federal regulation most wholesale rates previously unregulated. Quite the contrary is true. Although under the relevant cases, with which it was surely familiar, *In re Rahrer*, 140 U. S. 545 (1891); *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917),[1] Congress could have authorized state regulation of such rates, it chose not to do so. See *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 341 (1982) ("Nothing in the legislative history or language of [16 U. S. C. § 824(b)] evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause,' . . . or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade"). Instead Congress enacted Titles II and III of the Federal Power Act, 49 Stat. 847, 16 U. S. C. § 824 *et seq.* (1976 ed. and Supp. V), in 1935 (and the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.* (1976 ed. and Supp. V), in 1938) expressly adopting the *Attleboro* bright-line demarkation, see *FPC* v. *Southern California Edison Co.*, 376 U. S. 205 (1964); *United States* v. *Public Utilities Comm'n of Cal.*, *supra*. That Act provided that the FPC would set just and reasonable rates for public utilities that sold electric power at wholesale. 16 U. S. C. § 824d(a). The term public utility was defined broadly. 16

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[1] *Clark Distilling* upheld the Webb-Kenyon Act, 37 Stat. 699, prohibiting importation into a State of liquor to be received, possessed, or sold in violation of the laws of the State. About the time Congress passed the Public Utilities Holding Company Act, Congress also enacted a law substantially similar to the Webb-Kenyon Act, the Ashurst-Sumners Act, 49 Stat. 494, which made it unlawful to transport goods made by convict labor into any State where the goods were to be received, sold, or possessed in violation of its law. See *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 351 (1937) ("The Ashurst-Sumners Act as to interstate transportation of convict-made goods has substantially the same provisions as the Webb-Kenyon Act as to intoxicating liquors. . . . The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same").

But see *Cooley* v. *Board of Wardens*, 12 How. 299 (1852) (dicta).

U. S. C. § 824(e) (1976 ed., Supp. V).[2] Nowhere in the Act is there any indication that state authority to regulate wholesale rates was in any way expanded beyond that permitted by the Commerce Clause as interpreted in *Attleboro*. "What Congress did was to adopt the test developed in the *Attleboro* line [of cases] which denied state power to regulate a 'sale at wholesale to local distributing companies.'" *FPC* v. *Southern California Edison Co., supra*, at 214. "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana*, 332 U. S. 507, 517 (1947).

Congress thus affirmatively asserted jurisdiction over wholesale rates charged by all entities, either by giving the FPC jurisdiction or by freeing such entities from regulation because of their quasi-governmental nature. Neither of these options leaves room for state control of wholesale rates charged by public utilities (except those that are arms of the State or its political subdivisions); the first gives sole control to the FPC, the latter can be viewed as a decision that the rates of governmental and quasi-governmental entities are "best left *un*regulated," *ante*, at 384.

The Rural Electrification Act, 49 Stat. 1363, 7 U. S. C. § 901 *et seq.* (1976 ed. and Supp. V), was passed in 1936, and the Federal Power Commission later held that cooperatives such as appellant are not within its regulatory authority, not because they were exempted by the Rural Electrification Act, but because they are beyond the jurisdiction conferred on the Commission by the Federal Power Act. *Dairyland Power Cooperative*, 37 F. P. C. 12, 67 P. U. R. 3d 340 (1967).[3] This left the cooperatives' wholesale rates unregulated and beyond the reach of state authority, just as they would have been immediately after *Attleboro*. In the 47 years since the passage of the Rural Electrification Act, Congress has not sought to authorize state regulation of the wholesale rates charged by rural cooperatives. It has adhered to its wholesale-retail boundary between federal and state authority. In all these years, there has been no state rate regulation of rural cooperatives' wholesale rates. This was the necessary result of Congress' adopting as its own the *Attleboro* line and thereby occupying the field of wholesale regulation.[4]

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[2] Section 824(e) defines a public utility as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter." Section 796(4) defines a person as "an individual or a corporation." Section 796(3) defines a corporation as "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not . . . ."

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[3] The Court accepts the holding in *Dairyland* that the FPC lacks jurisdiction over rural cooperatives. It then notes that the FPC believed that regulation of some rural cooperatives would be proper. From all this the Court concludes that the lack of regulation of rural cooperatives does not represent a judgment that their wholesale rates are "best left *un*regulated," *ante*, at 384. The FPC, however, did not suggest that the State had any role to play in filling this regulatory void. Furthermore, there is no evidence that Congress thinks, or thought, that the cooperatives' wholesale rates should be regulated, or that, if they should be, the States rather than the FPC or the Rural Electrification Administration should do the regulating.

[4] Indeed, the only indication of the views of Congress with respect to the question of jurisdiction over the rates of rural cooperatives is the spate of bills introduced around the time that the FPC was considering the *Dairyland Power* case. These bills were designed to add rural cooperatives to the list of governmental instrumentalities exempt from FPC jurisdiction, *e. g.*, H. R. 5348, 90th Cong., 1st Sess. (1967); H. R. 8426, 90th Cong., 1st Sess. (1967), and reaffirm the jurisdiction of the Rural Electrification Administration over rural cooperatives. S. 1365, 90th Cong., 1st Sess. (1967) (introduced by Sens. Holland and Smathers); H. R. 7799, 90th Cong., 1st Sess. (1967) (introduced by Rep. Fascell). The Department of Justice, the FPC, and the Department of Agriculture (of which the REA is a part) took the position that the legislation was not needed to protect cooperatives from FPC control in light of the Commission's decision, in *Dairyland Power* (which had been announced by the start of the hearings on the bill), that rural cooperatives were governmental instrumentalities

The Court claims support for its apparent view that Congress authorized (or somehow expected) state control over wholesale rates charged by rural cooperatives in the legislative history of the Rural Electrification Act. In particular it points to statements that cooperatives were to comply with state regulation of retail rates, a power which the States possessed in the absence of congressional authorization. The Court then opines that there is no more reason to control retail rates than there is to control wholesale rates. From these two premises it infers that Congress in effect authorized, or at the very least expected, state regulation that this Court had barred States from engaging in. The two premises, however, do not support the conclusion. Congress did not expressly authorize state regulation of wholesale rates charged by cooperatives, and I find nothing in the history of the Rural Electrification Act to indicate that Congress was in any way departing from its basic decision to embrace the holding in *Attleboro* that the Commerce Clause barred the States from regulating wholesale rates.

The second source for its apparent view that the Rural Electrification Act allows state regulation of wholesale rates is a statement appearing in a Rural Electrification Bulletin. The statement basically instructs the borrower to comply with the wholesale rate orders of any body that has jurisdiction to make such rate orders. This statement is supposed to express a "policy of the REA [that] is wholly inconsistent with pre-emption of state regulatory jurisdiction" over wholesale rates. *Ante*, at 387. The Court's reliance on

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exempt from FPC jurisdiction. Hearings on H. R. 5348 et al. before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., 3 (1967) (letter from Lee C. White, Chairman, FPC, to Hon. Harley O. Staggers); *id.*, at 5 (letter from Orville L. Freeman, Secretary of Agriculture, to Hon. Harley O. Staggers); *id.*, at 6 (letter from Warren Christopher, Deputy Attorney General, to Hon. Harley O. Staggers). The bills were not reported out of committee.

this statement is misplaced. First, given the silence of the Rural Electrification Administration on this point, an isolated reference in an administrative bulletin is not persuasive evidence of the Administration's position. Second, in the absence of any persuasive evidence that Congress intended to depart from the *Attleboro* line in the case of cooperatives, I doubt seriously that the REA itself would purport to adopt a policy at odds with the law. And surely it did not do so in advising cooperatives to comply with the orders of any authority having jurisdiction. Nor am I persuaded that there was a general understanding at the state level that each of the States to which a generating cooperative delivered power at the wholesale level was free to regulate that cooperative's wholesale prices. Finally, the statement could have been intended to direct wholly intrastate cooperatives to comply with the orders of state commissions. In such a situation a State would have jurisdiction over wholesale rates and the Administration might well have concluded that it should honor state control over intrastate rates.[5]

Given the 48-year period in which Congress has asserted jurisdiction over wholesale rates and never manifested any belief that its policies would be furthered by state regulation of such rates, this Court should not purport to negate the congressional decision to abide by *Attleboro*. I would hold, as a matter of pre-emption, that absent a contrary indication from Congress States may not regulate wholesale rates of cooperatives.[6]

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[5] It is surely more reasonable to read a statement that a borrower is to comply with rate orders of any body that has jurisdiction to mean only that borrowers should comply with regulations governing intrastate wholesale sales, over which a State could constitutionally exercise jurisdiction, rather than reading it to mean that borrowers are to comply with rate orders of commissions whose exercise of jurisdiction is clearly unconstitutional.

[6] I do not reach the question of whether the limitation on state power implicit in the Commerce Clause proscribes Arkansas' assertion of jurisdiction in this case.

AMERICAN PAPER INSTITUTE, INC. *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-34. Argued March 22, 1983—Decided May 16, 1983*

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) was designed to encourage the development of cogeneration facilities and small power production facilities and to reduce the demand for fossil fuels. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to prescribe rules requiring electric utilities to deal with qualifying cogeneration and small power facilities. With respect to utilities' purchases of electricity from such facilities, § 210(b) provides that rates set by FERC "shall be just and reasonable to the electric consumers of the electric utility and in the public interest," shall not discriminate against qualified cogeneration and small power facilities, and shall not exceed "the incremental cost to the electric utility of alternative electric energy." Following rulemaking proceedings, FERC promulgated a rule requiring utilities to purchase electric energy from a qualifying facility at a rate equal to the utility's "full avoided cost," *i. e.*, the cost to the utility which, but for the purchase from the qualifying facility, would be incurred by the utility in generating the electricity itself or purchasing the electricity from another source. FERC also promulgated a rule requiring utilities to make such physical interconnections with cogenerators and small power producers as are necessary to effect purchases or sales of electricity authorized by PURPA. Upon review, the Court of Appeals vacated both rules, holding that FERC had not adequately explained its adoption of the full-avoided-cost rule, and that it exceeded its statutory authority in promulgating the interconnection rule, in view of § 210(e)(3) of PURPA, which provides that "[n]o qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from" specified provisions of the Federal Power Act (FPA) which require FERC to afford an opportunity for a hearing before ordering an interconnection.

Held:

1. FERC did not act arbitrarily or capriciously in promulgating the full-avoided-cost rule, which is the maximum rate permissible under

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*Together with No. 82-226, *Federal Energy Regulatory Commission* v. *American Electric Power Service Corp. et al.*, also on certiorari to the same court.

§ 210(b). Such rule plainly satisfies the requirement of § 210(b) that the rate not discriminate against qualifying cogeneration and small power production facilities. FERC also adequately explained why the rate is "just and reasonable to the electric consumers of the electric utility and in the public interest." Both the statutory language and the legislative history confirm that Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities. And although FERC recognized that the rule would not directly provide any rate savings to consumers, it reasonably deemed it more important at this time that the rule would provide a significant incentive for the development of cogeneration and small power production, and that ratepayers and the Nation as a whole will benefit from the decreased reliance on scarce fossil fuels and the more efficient use of energy. Pp. 412–418.

2. Nor did FERC exceed its authority in promulgating the interconnection rule. The authority granted by § 210(a) to promulgate such rules as are necessary to require utilities to deal with qualifying facilities plainly encompasses the power to promulgate rules requiring utilities to make physical connections with such facilities, and FERC reasonably interpreted § 210(e)(3) as forbidding it to exempt qualifying facilities from being the "target" of interconnection applications by other facilities under the FPA, but not as forbidding it to grant qualifying facilities the right to obtain interconnections under PURPA without applying for an order under the FPA. Such interpretation is supported by the purposes of PURPA and the statutory scheme created by both Acts. Pp. 418–423.

219 U. S. App. D. C. 1, 675 F. 2d 1226, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

Deputy Solicitor General Bator argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 82–226 were *Solicitor General Lee, Deputy Solicitor General Claiborne, Elliott Schulder, Charles A. Moore, Jerome M. Feit,* and *Robert F. Shapiro. Zachary Shimer, Paul G. Pennoyer, Jr., Rigdon H. Boykin, Richard L. Schmalz,* and *Walter Kiechel, Jr.,* filed briefs for petitioner in No. 82–34.

Edward Berlin argued the cause for respondents in both cases. With him on the brief for respondent Electric Utilities was *Thomas M. Lemberg*, *Andrew D. Weissman*, *Robert S. Taylor*, *A. Joseph Dowd*, and *Peter Garam*. *John T. Miller, Jr.*, filed a brief for respondent Elizabethtown Gas Co.[†]

JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns two rules promulgated by the Federal Energy Regulatory Commission (FERC) pursuant to § 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 92 Stat. 3144, as amended, 16 U. S. C. § 824a–3 (1976 ed., Supp. V). The first rule requires electric utilities to purchase electric energy from cogenerators and small power producers at a rate equal to the purchasing utility's full avoided cost, *i. e.*, the cost the utility would have incurred had it generated the electricity itself or purchased the electricity from another source. The second rule requires utilities to make such interconnections with cogenerators and small power producers as are necessary to effect purchases or sales of electricity authorized by PURPA. The Court of Appeals held that FERC had not adequately explained its adoption of the full-avoided-cost rule, and that it exceeded its statutory authority in promulgating the interconnection rule. 219 U. S. App. D. C. 1, 675 F. 2d 1226 (1982). We reverse.

I

A

Section 210 of PURPA was designed to encourage the development of cogeneration and small power production facilities.[1] As we noted in *FERC* v. *Mississippi*, 456 U. S. 742, 750 (1982) (footnote omitted), "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels," and it recognized that electric utilities had traditionally been "reluctant to purchase power from, and to sell power to, the nontraditional facilities." Accordingly, Congress directed FERC to prescribe, within one year of the statute's enactment, rules requiring electric utilities to deal with qualifying cogeneration and small power production facilities. PURPA § 210(a), 16 U. S. C. § 824a–3(a) (1976 ed., Supp. V). With respect to the purchase of electricity from cogeneration and small power production facilities, Congress provided that the rate to be set by the Commission

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[†] Briefs of *amici curiae* urging reversal were filed by *Samuel Efron*, *David J. Bardin*, *James P. Mercurio*, and *Lewis E. Leibowitz* for Diamond Shamrock Corp. et al.; by *Robert H. Loeffler*, *Steven S. Rosenthal*, and *Henry D. Levine* for Kerr-McGee Chemical Corp. et al.; and by *Gregory A. Thomas*, *Alan S. Miller*, and *William A. Butler* for the Natural Resources Defense Council, Inc.

Robert L. Baum, *Carl D. Hobelman*, and *Eugene R. Fidell* filed a brief for the Edison Electric Institute as *amicus curiae* urging affirmance.

> "(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> "(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.
>
> "No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." PURPA § 210(b), 16 U. S. C. § 824a–3(b) (1976 ed., Supp. V).

Following rulemaking proceedings, FERC promulgated regulations governing transactions between utilities and those cogeneration and small power production facilities, designated as "qualifying facilities," 18 CFR §§ 292.201–292.207

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[1] The statute defines a "cogeneration facility" as a facility that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U. S. C. § 796(18)(A) (1976 ed., Supp. V). A "small power production" facility is a facility that has a production capacity of not more than 80 megawatts and produces electric power from biomass, waste, or renewable resources such as wind, water, or solar energy. 16 U. S. C. § 796(17)(A) (1976 ed., Supp. V).

(1982), that may invoke the provisions of PURPA to sell electricity to and purchase electricity from utilities.

The first regulation at issue in this case, 18 CFR § 292.-304(b)(2) (1982), requires a utility to purchase electricity from a qualifying facility at a rate equal to the utility's full avoided cost. The utility's full avoided cost is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." PURPA § 210(d), 16 U. S. C. § 824a–3(d) (1976 ed., Supp. V). See 18 CFR § 292.101(b)(6) (1982) (the term full "avoided costs" used in the regulations is the equivalent of the term "incremental cost of alternative electric energy" used in § 210(d) of PURPA). In its order accompanying the promulgation of this rule, FERC explained its decision to set the rate at full avoided cost rather than at a level that would result in direct rate savings for utility customers by permitting a utility to obtain energy at a cost less than the cost to the utility of producing the energy itself or purchasing it from an alternative source. 45 Fed. Reg. 12214 (1980). The Commission emphasized the need to provide incentives for the development of cogeneration and small power production:

> "[I]n most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual customer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers, they may provide a significant incentive for a higher growth rate of these technologies." *Id.*, at 12222.

The Commission noted that "ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy." *Ibid.*

FERC rejected proposals that it set the rate for the purchase of electricity from qualifying facilities at a fixed percentage of the purchasing utility's full avoided cost:

> "[I]n most situations, a qualifying cogenerator or small power producer will only produce energy if its marginal cost of production is less than the price he receives for its output. If some fixed percentage is used, a qualifying facility may cease to produce additional units of energy when its costs exceed the price to be paid by the utility. If this occurs, the utility will be forced to operate generating units which either are less efficient than those which would have been used by the qualifying facility, or which consume fossil fuel rather than the alternative fuel which would have been consumed by the qualifying facility had the price been set at full avoided costs." *Id.*, at 12222–12223.

The second regulation at issue here, 18 CFR §292.303 (1982), provides that electric utilities shall purchase electricity made available by qualifying facilities, sell electricity to qualifying facilities upon request, and, most important for present purposes, "make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart." §292.303(c)(1). An interconnection is a physical connection that allows electricity to flow from one entity to another.[2]

In its order the Commission rejected the contention that §210(e)(3) of PURPA requires it to afford an opportunity for an evidentiary hearing to any utility that is unwilling to make an interconnection with a qualifying facility that has invoked the provisions of PURPA to enter into a purchase or sale with the utility. Section 210(e)(3), 92 Stat. 3145, provides in relevant part:

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[2] In an accompanying regulation, FERC directed that each qualifying facility "pay any interconnection costs which the State regulatory authority . . . or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis." 18 CFR §292.306(a) (1982).

> "No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—
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> . . . . .
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> "(B) the provisions of section 210 . . . or 212 of the Federal Power Act . . . or the necessary authorities for enforcement of any such provision under the Federal Power Act . . . ." 16 U. S. C. § 824a–3(e)(3) (1976 ed., Supp. V).

Sections 210 and 212 of the Federal Power Act (FPA), 16 U. S. C. §§ 824i and 824k (1976 ed., Supp. V), describe the procedure to be followed by FERC when an electric utility, federal power marketing agency, cogenerator, or small power producer applies for an order requiring another such facility to make an interconnection. Section 210 provides that, upon receipt of an application for an order requiring an interconnection, the Commission shall issue notice to each affected state regulatory authority, utility, federal power marketing agency, and owner or operator of a cogeneration facility or small power production facility, and to the public, § 210(b)(1), 16 U. S. C. § 824i(b)(1) (1976 ed., Supp. V), afford an opportunity for an evidentiary hearing, § 210(b)(2), 16 U. S. C. § 824i(b)(2) (1976 ed., Supp. V), and issue an order approving the application only if it determines that approval

> "(1) is in the public interest,
> "(2) would—
> "(A) encourage overall conservation of energy or capital,
> "(B) optimize the efficiency of use of facilities and resources, or
> "(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and
> "(3) meets the requirements of [§ 212 of the FPA]." 16 U. S. C. § 824i(c) (1976 ed., Supp. V).

Section 212 of the FPA, 16 U. S. C. § 824k (1976 ed., Supp. V), provides that an order approving an interconnection under § 210 may be issued only if the Commission determines that the interconnection is not likely to result in a reasonably ascertainable uncompensated loss for any electric utility, cogenerator, or small power producer, impose an undue burden on any such facility, unreasonably impair the reliability of any electric utility, or impair the ability of any electric utility to supply adequate service to its customers.[3]

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[3] Section 212 of the FPA, as set forth in 16 U. S. C. § 824k (1976 ed., Supp. V), provides in pertinent part:

(a) "No order may be issued by the Commission under section 824i [FPA § 210] . . . of this title unless the Commission determines that such order—

"(1) is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

"(2) will not place an undue burden on an electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

"(3) will not unreasonably impair the reliability of any electric utility affected by the order; and

"(4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers.

"The determination under paragraph (1) shall be based upon a showing of the parties. The Commission shall have no authority under section 824i . . . of this title to compel the enlargement of generating facilities."

(b) "No order may be issued under section 824i . . . of this title unless the applicant for such order demonstrates that he is ready, willing, and able to reimburse the party subject to such order for—

"(1) in the case of an order under section 824i of this title, such party's share of the reasonably anticipated costs incurred under such order . . ."

. . . . .

(d) "If the Commission does not issue any order applied for under section 824i . . . of this title, the Commission shall, by order, deny such application and state the reasons for such denial."

(e) "No provision of section 824i . . . of this title shall be treated—

"(1) as requiring any person to utilize the authority of such section 824i . . . of this title in lieu of any other authority of law, or

"(2) as limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law."

In concluding that an evidentiary hearing under the FPA is not required prior to an interconnection necessary to complete a purchase or sale authorized by PURPA, the Commission reasoned that §210(a) of PURPA "provides a general mandate for the Commission to prescribe rules necessary to encourage cogeneration and small power production." 45 Fed. Reg. 12221 (1980). The Commission also emphasized that "a basic purpose of section 210 of PURPA is to provide a market for the electricity generated by small power producers and cogenerators," and that "to require qualifying facilities to go through the complex procedures set forth in section 210 of the Federal Power Act to gain interconnection would, in most circumstances, significantly frustrate" the achievement of that purpose. *Ibid.*

Following the filing of several petitions for rehearing, the Commission issued an order adhering to both the full-avoided-cost rule and the interconnection rule. *Id.*, at 33958.

B

Respondents American Electric Power Service Corp., Consolidated Edison Co. of New York, Inc., and Colorado-Ute Electric Association, Inc., sought review of the Commission's rules in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals vacated both rules. 219 U. S. App. D. C. 1, 675 F. 2d 1226 (1982).

The Court of Appeals concluded that FERC had not adequately demonstrated that the full-avoided-cost rule was consistent with the mandate of §210(b) of PURPA that the Commission prescribe rates for purchases of electric energy from qualifying facilities that are "'just and reasonable to the electric consumers of the electric utility'" and "'in the public interest.'" *Id.*, at 7, 675 F. 2d, at 1232. "By ordering that the purchase rate be equal to the full avoided cost in every case, FERC has, without convincing explanation, simply adopted as a uniform rule the maximum purchase rate specified in the statute." *Id.*, at 8, 675 F. 2d, at 1233.[4] The court stressed that "FERC should allocate the benefits more evenly between the cogenerators and the utilities if the utilities can demonstrate that, under a percentage of avoided cost approach, an allocation less heavily favoring the cogenerators is in the public interest and the interest of the utilities' electric consumers, and will not disproportionately discourage cogeneration." *Id.*, at 9, 675 F. 2d, at 1234. While acknowledging that an approach requiring calculation of each cogenerator's costs on a case-by-case basis "would indeed veer toward the public utilities-style rate setting that Congress wanted to avoid," the Court of Appeals emphasized that FERC should have given additional consideration to a percentage-of-avoided-cost approach, whereby FERC would either set a percentage itself or establish a range within which each state regulatory commission could fix a precise percentage. *Ibid.*[5]

The Court of Appeals held that FERC had exceeded its authority in promulgating the interconnection rule. The court reasoned that the "relatively *specific limitation* on authority in PURPA section 210(e)(3) . . . must control over the relatively *general grant* of authority in FPA section 212(e)." *Id.*, at 15, 675 F. 2d, at 1240 (emphasis in original). The court concluded that the Commission must provide notice to interested parties and afford an opportunity for an evidentiary hearing with respect to each interconnection requested by a qualifying facility.

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[4] With respect to the Commission's statement that any savings to consumers that a lower rate might produce would be insignificant in comparison to the benefit to qualifying facilities provided by the full-avoided-cost rate, the court suggested that the Commission had failed to "bear in mind, as Congress surely knew, that inevitably the impact of FERC's rules per consumer will be less than their impact per cogenerator." 219 U. S. App. D. C., at 9, 675 F. 2d, at 1234.

[5] The court proceeded to "outline some additional concerns raised by the full avoided cost rule, which the Commission should address in its subsequent rulemaking." *Ibid.* See *id.*, at 9–11, 675 F. 2d, at 1234–1236.

Following the denial of petitions for rehearing and rehearing en banc,[6] petitions for certiorari were filed by both FERC and American Paper Institute, Inc., the national trade association of the pulp, paper, and paperboard industry, which accounts for a large share of the cogeneration of electric power in the United States today. We granted both petitions. 459 U. S. 904 (1982).

II

The first question before us is whether FERC's action in promulgating the full-avoided-cost rule was "arbitrary, capricious, [or] an abuse of discretion." 5 U. S. C. § 706(2)(A).[7]

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[6] In denying a petition for rehearing, the Court of Appeals emphasized that it had not declared the full-avoided-cost rule inconsistent with PURPA but had "simply remanded the matter because the Commission had failed to explain 'its rationale and process of consideration.'" 219 U. S. App. D. C., at 21, 675 F. 2d, at 1246, quoting *id.*, at 8, 675 F. 2d, at 1233. A suggestion for rehearing en banc was denied by a vote of 3 to 2, with 6 of the 11 active Circuit Judges not participating. *Id.*, at 21, 675 F. 2d, at 1246.

[7] It is not entirely clear from the Court of Appeals' opinion what standard of review the court applied, but it appears that the court may have erroneously employed the substantial-evidence standard. The court criticized FERC for failing "to demonstrate the factual basis," *id.*, at 9, 675 F. 2d, at 1234, for its finding that sharing the savings from cogeneration with consumers would afford consumers only insubstantial savings, and it cited in a footnote an earlier decision that had employed the substantial-evidence test in a case involving informal rulemaking by the Commission under the FPA. *Id.*, at 9, n. 36, 675 F. 2d, at 1234, n. 36, citing *Public Systems* v. *FERC*, 196 U. S. App. D. C. 66, 606 F. 2d 973 (1979).

In any event, the Court of Appeals should have applied only the arbitrary-and-capricious standard. Unlike the FPA, see 16 U. S. C. § 825*l*(b), PURPA does not direct reviewing courts to determine whether orders entered thereunder are supported by substantial evidence. In the absence of a specific command in PURPA to employ a particular standard of review, the full-avoided-cost rule must be reviewed solely under the more lenient arbitrary-and-capricious standard prescribed by the Administrative Procedure Act for judicial review of informal rulemaking. See, *e. g.*, *FCC*

We cannot answer this question simply by noting that the full-avoided-cost rule is within the range of permissible rates that Congress established in § 210(b) of PURPA. The Commission plainly has the authority to adopt a full-avoided-cost rule, for PURPA sets full avoided cost as the maximum rate that the Commission may prescribe. Whether the Commission properly exercised that authority is a separate issue. To decide whether the Commission's action was "arbitrary, capricious, [or] an abuse of discretion," we must determine whether the agency adequately considered the factors relevant to choosing a rate that will best serve the purposes of the statute, and whether the agency committed "a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416 (1971).

FERC's explanation of its reasons for promulgating the full-avoided-cost rule must be examined in light of the criteria set forth in § 210(b) of PURPA, 16 U. S. C. § 824a–3(b) (1976 ed., Supp. V), which provides that the purchase rate established by the Commission must be "just and reasonable to the electric consumers of the electric utility and in the public interest" and must not discriminate against qualifying facilities.[8] Since the full-avoided-cost rule plainly satisfies the nondiscrimination requirement, we need only consider whether FERC adequately explained why the rule is "just and reasonable to the electric consumers of the electric utility and in the public interest."

We cannot accept respondents' suggestion, Brief for Respondent Electric Utilities 9, and n. 4, that the "just and reasonable" language in § 210(b) was intended to require that the purchase rate be set "'at the lowest possible reasonable rate

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v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 803 (1978).

[8] See also H. R. Conf. Rep. No. 95–1750, p. 98 (1978) (the purchase rate prescribed by the Commission is to be "the lower of . . . a rate which is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, or the incremental cost of alternate electric energy").

consistent with the maintenance of adequate service in the public interest.'" *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U. S. 378, 388 (1959), quoting the original version of the Natural Gas Act. Simply on the basis of the statutory language, we would be reluctant to infer that Congress intended the terms "'just and reasonable,'" which are frequently associated with cost-of-service utility ratemaking, see, *e. g.*, *NAACP* v. *FPC*, 425 U. S. 662, 666 (1976), to adopt a cost-of-service approach in the very different context of cogeneration and small power production by nontraditional facilities. The legislative history confirms, moreover, that Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities. The Conference Report states in pertinent part:

> "It is not the intention of the conferees that cogenerators and small power producers become subject . . . to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power. The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.
>
> "[C]ogeneration is to be encouraged under this section and therefore the examination of the level of rates which should apply to the purchase by the utility of the cogenerator's or small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of utility type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production." H. R. Conf. Rep. No. 95–1750, pp. 97–98 (1978).

In contrast, a subsequent passage in the Conference Report explicitly states that the "just and reasonable" language of §210(c), 16 U. S. C. §824a-3(c) (1976 ed., Supp. V), which concerns sales *by* utilities *to* qualifying facilities, "*is* intended to refer to traditional utility ratemaking concepts." H. R. Conf. Rep. No. 95-1750, *supra*, at 98 (emphasis added).

The Commission did not ignore the interest of electric utility consumers "in receiving electric energy at equitable rates." H. R. Conf. Rep. No. 95-1750, *supra*, at 97.[9] The Commission recognized that the full-avoided-cost rule would not directly provide any rate savings to electric utility consumers, but deemed it more important that the rule could "provide a significant incentive for a higher growth rate" of cogeneration and small power production, and that "these ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy."[10] 45 Fed. Reg. 12222 (1980). As the Commission explained, a purchase rate established at a fixed percentage of avoided cost would discourage production of electric energy by qualifying facilities whose marginal costs exceeded the rate that a purchasing utility would be required to pay under this approach, whereas those same facilities would retain an incentive to produce energy under the full-avoided-cost rule so long as their marginal costs did not exceed the full avoided cost of the purchasing utility. *Id.*, at 12222–12223.

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[9] We interpret the "just and reasonable" language of §210(b) to require consideration of potential rate savings for electric utility consumers. Of course, even when utilities purchase electric energy from qualifying facilities at full avoided cost rather than at some lower rate, the rates the utilities charge their customers will not be increased, for by hypothesis the utilities would have incurred the same costs had they generated the energy themselves or purchased it from other sources. Moreover, a utility's existing rates will ordinarily have been determined to be "just and reasonable" by the appropriate state regulatory authority. But it does not follow that the full-avoided-cost rule is necessarily "just and reasonable to the electric consumers of the electric utilities" within the meaning of §210(b) of PURPA. Unless the "just and reasonable" language is to be regarded as mere surplusage, it must be interpreted to mandate consideration of rate savings for consumers that could be produced by setting the rate at a level lower than the statutory ceiling.

[10] A decrease in the utilities' reliance on fossil fuels may result in a reduction of the prices of those fuels to levels lower than would have been the case with higher demand. Since the rates the utilities are permitted to charge their customers are based on their costs, electric utility customers can expect to share in the savings to the utilities resulting from reduced fuel prices.

The Commission would have encountered considerable difficulty had it attempted to determine an appropriate rate less than full avoided cost. A wide variety of technologies are used in cogeneration and small power production, including internal combustion engines, steam turbines, combustion turbines, windmills, solar cells, and hydro turbines. Facilities may vary greatly in capacity. It would have been extremely difficult, if not impossible, for the Commission to make any useful estimate of the amount of cogeneration and small power production that would be discouraged by setting the rate at a level lower than full avoided cost.

It bears emphasizing that the full-avoided-cost rule is not as inflexible as might appear at first glance. First, any state regulatory authority and any nonregulated utility may apply to the Commission for a waiver of the rule. A waiver may be granted if the applicant demonstrates that a full-avoided-cost rate is unnecessary to encourage cogeneration and small power production. 18 CFR § 292.403 (1982). Second, a qualifying facility and a utility may negotiate a contract setting a price that is lower than a full-avoided-cost rate. § 292.301(b)(1). Because the full-avoided-cost rule is subject to revision by the Commission as it obtains experience with the effects of the rule, it may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate. The Commission's rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement.

Under these circumstances it was not unreasonable for the Commission to prescribe the maximum rate authorized by PURPA.[11] The Commission's order makes clear that the Commission considered the relevant factors and deemed it most important at this time to provide the maximum incentive for the development of cogeneration and small power production, in light of the Commission's judgment that the entire country will ultimately benefit from the increased development of these technologies and the resulting decrease in the Nation's dependence on fossil fuels. The Commission has a statutory mandate to set a rate that is "in the public interest," and as this Court stated in *NAACP* v. *FPC*, 425 U. S., at 669, "the words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation." The basic purpose of § 210 of PURPA was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels. See *FERC* v. *Mississippi*, 456 U. S., at 750. At this early stage in the implementation of PURPA, it was reasonable for the Commission to prescribe the maximum rate authorized by Congress and thereby provide the maximum incentive for the development of cogeneration and small power production.

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[11] We reach this conclusion even though we agree with the Court of Appeals, see n. 4, *supra*, that the rule was not adequately explained by the Commission's observation that "in most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual customer," whereas the rule would provide significant incentives for cogenerators and small power producers. 45 Fed. Reg. 12222 (1980). In the context of ratemaking, it is typically the case that any increment in the rate will "make a small dent in the consumer's pocket," *FPC* v. *Texaco Inc.*, 417 U. S. 380, 399 (1974), while that same increment will have substantial consequences for the parties to whom the rate is paid. FERC's statutory mandate to prescribe a rate that "shall be just and reasonable to the electric consumers of the electric utility," 16 U. S. C. § 824a-3(b)(1) (1976 ed., Supp. V), obviously reflects a congressional determination that potential savings for consumers as a class are important even though rate changes will generally not have great economic significance for any individual consumer. Cf. *FPC* v. *Texaco Inc.*, *supra*, at 399 ("Even if the effect of increased small-producer prices would make a small dent in the consumer's pocket, . . . the [Natural Gas] Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted").

III

Absent § 210(e)(3) of PURPA, there would be no doubt as to the validity of the Commission's interconnection rule. Section 210(a) of PURPA, 16 U. S. C. § 824a–3(a) (1976 ed., Supp. V), provides the Commission with general authority to promulgate

> "such rules as it determines necessary to encourage cogeneration and small power production . . . which rules require electric utilities to offer to—
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> "(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
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> "(2) purchase electric energy from such facilities."

The authority to promulgate such rules as are necessary to require purchases and sales plainly encompasses the power to promulgate rules requiring utilities to make physical connections with qualifying facilities in order to consummate purchases and sales authorized by PURPA. No purchase or sale can be completed without an interconnection between the buyer and seller.

In the absence of a specific provision to the contrary, the Commission's power to promulgate rules under PURPA requiring interconnections would not be negated by the provisions of the FPA that give the Commission the authority to conduct adjudicatory proceedings and issue orders requiring interconnections. As a general matter, the existence of power to proceed by adjudication under one statute is in no way inconsistent with the existence of power to proceed by rulemaking under another statute. Moreover, there is nothing in the FPA to suggest that the Commission must proceed by adjudication in determining the obligations of facilities within its jurisdiction to make interconnections. On the contrary, Congress expressly provided in § 212(e) of the FPA, 16 U. S. C. § 824k(e) (1976 ed., Supp. V), that § 210 of the FPA shall not be construed "as requiring any person to utilize the authority of [§ 210] . . . in lieu of any other authority of law," or "as limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law."

The critical question, therefore, is whether § 210(e)(3) of PURPA deprives FERC of the power it would otherwise have under § 210(a) of PURPA to promulgate rules requiring utilities to make such interconnections with qualifying facilities as are necessary to effect purchases or sales authorized by the Act. In holding the interconnection rule invalid, the Court of Appeals relied upon what it took to be "the literal meaning" of § 210(e)(3), 219 U. S. App. D. C., at 15, 675 F. 2d, at 1240, which states in pertinent part:

> "No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—
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> * * * * *
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> "(B) the provisions of section 210 . . . or 212 of the Federal Power Act . . . or the necessary authorities for enforcement of any such provision under the Federal Power Act . . . ."

The Court of Appeals interpreted § 210(e)(3) of PURPA to mean that FERC may not promulgate a rule requiring utilities to interconnect with qualifying facilities in order to complete purchases and sales the utilities are required to enter into under PURPA, but must instead afford an opportunity for an evidentiary hearing under §§ 210 and 212 of the FPA in the case of each purchase and sale.

While the language of § 210(e)(3) of PURPA can be so interpreted, the purposes of PURPA strongly support the Commission's contrary reading of that provision. The purposes of the statute make it most unlikely that Congress could have intended that an evidentiary hearing be held for every interconnection necessary to consummate a purchase or sale of electricity authorized by the Act. Evidentiary hearings under § 210 of the FPA entail a determination of whether a proposed interconnection (1) is in the public interest, and (2) would encourage overall conservation of energy or capital, optimize the efficiency of use of facilities and resources, or improve the reliability of the affected utility systems. 16 U. S. C. § 824i(c)(1) (1976 ed., Supp. V). It is highly doubtful that Congress could have intended that the Commission make such a determination every time a qualifying facility seeks to hook up with a utility to complete a purchase or sale under PURPA, for Congress itself determined in enacting PURPA that these purchases and sales are in the public interest, and that the development of cogeneration and small power production will help to conserve energy and capital and ensure the more efficient use of the Nation's resources.

Providing an opportunity for evidentiary hearings before the Commission for every interconnection necessary to complete a purchase or sale under PURPA would seriously impede the very development of cogeneration and small power production that Congress sought to facilitate. Many of the facilities in question are small operations. By definition a small power production facility has a production capacity of no more than 80 megawatts, 16 U. S. C. § 796(17)(A)(ii) (1976 ed., Supp. V), and cogeneration facilities may also be of modest size. Many owners of qualifying facilities would have little incentive to purchase or sell electric energy if they had to go through an evidentiary hearing before FERC in Washington, D. C., every time they needed to hook up with a utility to consummate a purchase or sale. The average cost to FERC of a contested interconnection proceeding is currently more than $57,000, see FERC Notice of Proposed Rulemaking, Docket RM 82–38–000, Fees Applicable to Electric Utilities, Cogenerators, and Small Power Producers 29–30 (Sept. 1, 1982), and the costs to private parties are doubtless also substantial. If we were to hold that utilities must be provided an opportunity for a hearing whenever a qualifying facility seeks an interconnection in order to effectuate a purchase or sale under PURPA, we would be "imput[ing] to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 489 (1947). Cf. *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 132–133 (1977); *Permian Basin Area Rate Cases*, 390 U. S. 747, 777 (1968).

We agree with the Commission that, in light of the entire statutory scheme, § 210(e)(3) of PURPA may reasonably be interpreted to forbid the Commission to exempt qualifying facilities from being the target of applications under the FPA for orders "requiring . . . [a] physical connection," FPA, § 210(a)(1), but not to forbid the Commission to grant qualifying facilities the right to obtain interconnections without applying for an order under the FPA. The use of the word "exempted" in § 210(e)(3) is consistent with an intent to ensure only that qualifying facilities not be immunized from the requirements that the Commission may impose under §§ 210 and 212 of the FPA. The term "exemption" is ordinarily used to denote relief from a duty or service. See, *e. g.*, Black's Law Dictionary 513 (5th ed. 1979) (to "exempt" is "to relieve, excuse or set free from a duty or service imposed upon the general class to which the individual exempted belongs"). The only duty that §§ 210 and 212 of the FPA directly impose upon any facility is the duty to obey an order "requiring . . . [a] physical connection." Section 212(e) of the FPA expressly states that § 210 of the FPA shall *not* be construed "as requiring any person to utilize the authority of [§ 210] . . . in lieu of any other authority of law." Significantly, the Commission's interconnection rule does not immunize qualifying facilities from the only requirement that §§ 210 and 212 of the FPA do directly impose on them—the requirement that they obey an interconnection order issued under those provisions. Qualifying facilities remain subject to applications by other facilities for orders requiring them to make interconnections. The Commission's rule simply permits qualifying facilities to take certain steps to require *other parties*, namely, electric utilities, to make interconnections.[12]

The Commission's interconnection rule represents "'a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), quoting *Power Reactor Development Co.* v. *Electrical Workers*, 367 U. S. 396, 408 (1961). To uphold it, "we need not find that [FERC's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946). See *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 371–372 (1973). We need only conclude that it is *a* reasonable interpretation of the relevant provisions. For the reasons stated above, we do conclude that the Commission's interpretation is reasonable and that the Court of Appeals erred in rejecting that interpretation.

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[12] The Commission's interpretation also finds support in the indications in the legislative history of §§ 210 and 212 of the FPA that those provisions were intended to address a different situation. Prior to their enactment, the Commission's authority to order interconnections was limited, under § 202(b) of the FPA, 16 U. S. C. § 824a(b), to utilities over which it had regulatory jurisdiction and, except in emergencies, to situations in which a "person engaged in the . . . sale of electric energy" applied for an order directing such a utility to interconnect. Congress was concerned with the refusal of some intrastate utilities to make interconnections with other systems because, had they done so, they would have become part of the interstate system and thereby become subject to the full range of regulation under the FPA. See 124 Cong. Rec. 34763–34764 (1978) (Sen. Metzenbaum); *id.*, at 34770 (Sen. Bartlett); 123 Cong. Rec. 31194 (1977) (Sen. Johnston); *id.*, at 32397–32398 (colloquy between Sen. Johnston and Sen. Domenici). Sections 210, 211, and 212 of the FPA were enacted to give the Commission authority to order interconnections where they will enhance the reliability of the Nation's electric power systems and optimize the use of its generating capacity. At the same time, Congress provided, in § 201(b)(2) of the FPA, 16 U. S. C. § 824(b)(2) (1976 ed., Supp. V), that compliance with orders to interconnect issued under § 210 or § 211 would not subject an entity to regulation by the Commission under any other provision of the Act. There is nothing in the legislative history of §§ 210–212 to suggest that they were intended to provide the exclusive means of obtaining an interconnection.

IV

We hold that the Commission did not act arbitrarily or capriciously in promulgating the full-avoided-cost rule or exceed its authority in promulgating the interconnection rule. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of these cases.

HENSLEY ET AL. *v.* ECKERHART ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1244. Argued November 3, 1982—Decided May 16, 1983

Respondents, on behalf of all persons involuntarily confined in the forensic unit of a Missouri state hospital, brought suit in Federal District Court against petitioner hospital officials, challenging the constitutionality of treatment and conditions at the hospital. The District Court, after a trial, found constitutional violations in five of the six general areas of treatment. Subsequently, respondents filed a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." After determining that respondents were prevailing parties under § 1988 even though they had not succeeded on every claim, the District Court refused to eliminate from the attorney's fees award the hours spent by respondents' attorneys on the unsuccessful claims, finding that the significant extent of the relief clearly justified the award of a reasonable attorney's fee. The Court of Appeals affirmed.

Held: The District Court did not properly consider the relationship between the extent of success and the amount of the attorney's fee award. The extent of a plaintiff's success is a crucial factor in determining the proper amount of an attorney's fee award under § 1988. Where the plaintiff failed to prevail on a claim unrelated to the successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the court should award only that amount of fees that is reasonable in relation to the results obtained. Pp. 429–440.

664 F. 2d 294, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 440. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 441.

Michael L. Boicourt, Assistant Attorney General of Missouri, argued the cause for petitioners. With him on the brief was *John Ashcroft*, Attorney General.

Stanley J. Eichner argued the cause and filed a brief for respondents.*

**Robert E. Williams, Douglas S. McDowell,* and *Lorence L. Kessler* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Steven L. Winter, Norman J. Chachkin, and *E. Richard Larson* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Pennsylvania et al. by *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Andrew S. Gordon* and *Allen C. Warshaw*, Deputy Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Wilson L. Condon*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General, *John Steven Clark*, Attorney General of Arkansas, *George Deukmejian*, Attorney General of California, *J.D. MacFarlane*, Attorney General of Colorado, *Richard S. Gebelein*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Tany S. Hong*, Attorney General of Hawaii, *David H. Leroy*, Attorney General of Idaho, *Tyrone C. Fahner*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Steven L. Beshear*, Attorney General of Kentucky, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Francis X. Bellotti*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Warren R. Spannaus*, Attorney General of Minnesota, *William A. Allain*, Attorney General of Mississippi, *Paul L. Douglas*, Attorney General of Nebraska, *Richard H. Bryan*, Attorney General of Nevada, *Gregory H. Smith*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, *Robert O. Wefald*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *Jan Eric Cartwright*, Attorney General of Oklahoma, *Hector Reichard*, Attorney General of Puerto Rico, *Daniel R. McLeod*, Attorney General of South Carolina, *Mark D. Meierhenry*, Attorney General of South Dakota, *William M. Leech, Jr.*, Attorney General of Tennessee, *Mark White*, Attorney General of Texas, *David L. Wil-*

JUSTICE POWELL delivered the opinion of the Court.

Title 42 U. S. C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.

I

A

Respondents brought this lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Fulton, Mo. The Forensic Unit consists of two residential buildings for housing patients who are dangerous to themselves or others. Maximum-security patients are housed in the Marion O. Biggs Building for the Criminally Insane. The rest of the patients reside in the less restrictive Rehabilitation Unit.

In 1972 respondents filed a three-count complaint in the District Court for the Western District of Missouri against petitioners, who are officials at the Forensic Unit and members of the Missouri Mental Health Commission. Count I challenged the constitutionality of treatment and conditions at the Forensic Unit. Count II challenged the placement of patients in the Biggs Building without procedural due process. Count III sought compensation for patients who performed institution-maintaining labor.

Count II was resolved by a consent decree in December 1973. Count III largely was mooted in August 1974 when

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kinson, Attorney General of Utah, *John J. Easton*, Attorney General of Vermont, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Chauncey H. Browning*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Steven F. Freudenthal*, Attorney General of Wyoming, and for the American Bar Association by *David R. Brink* and *M. D Taracido*.

petitioners began compensating patients for labor pursuant to the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* In April 1975 respondents voluntarily dismissed the lawsuit and filed a new two-count complaint. Count I again related to the constitutionality of treatment and conditions at the Forensic Unit. Count II sought damages, based on the Thirteenth Amendment, for the value of past patient labor. In July 1976 respondents voluntarily dismissed this back-pay count. Finally, in August 1977 respondents filed an amended one-count complaint specifying the conditions that allegedly violated their constitutional right to treatment.

In August 1979, following a three-week trial, the District Court held that an involuntarily committed patient has a constitutional right to minimally adequate treatment. 475 F. Supp. 908, 915 (1979). The court then found constitutional violations in five of six general areas: physical environment; individual treatment plans; least restrictive environment; visitation, telephone, and mail privileges; and seclusion and restraint.[1] With respect to staffing, the sixth general area, the District Court found that the Forensic Unit's staffing levels, which had increased during the litigation, were minimally adequate. *Id.*, at 919–920. Petitioners did not appeal the District Court's decision on the merits.

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[1] Under "physical environment" the court found that certain physical aspects of the Biggs Building were not minimally adequate. 475 F. Supp., at 916–919.

Under "individual treatment plans" the court found that the existing plans were adequate, but that the long delay in preparation of initial plans after patients were admitted and the lack of regular review of the plans operated to deny patients minimally adequate plans. *Id.*, at 921–922.

Under "least restrictive environment" the court found unconstitutional the delay in transfer of patients from the Biggs Building to the Rehabilitation Unit following a determination that they no longer needed maximum-security confinement. *Id.*, at 922–923.

Under "visitation, telephone and mail" the court found that the visitation and telephone policies at the Biggs Building were so restrictive that they constituted punishment and therefore violated patients' due process rights. *Id.*, at 923–925.

Under "seclusion and restraint" the court rejected respondents' claim that patients were given excessive medication as a form of behavior control. The court then found that petitioners' practices regarding seclusion and physical restraint were not minimally adequate. *Id.*, at 925–928.

B

In February 1980 respondents filed a request for attorney's fees for the period from January 1975 through the end of the litigation. Their four attorneys claimed 2,985 hours worked and sought payment at rates varying from $40 to $65 per hour. This amounted to approximately $150,000. Respondents also requested that the fee be enhanced by 30 to 50 percent, for a total award of somewhere between $195,000 and $225,000. Petitioners opposed the request on numerous grounds, including inclusion of hours spent in pursuit of unsuccessful claims.

The District Court first determined that respondents were prevailing parties under 42 U. S. C. § 1988 even though they had not succeeded on every claim. It then refused to eliminate from the award hours spent on unsuccessful claims:

> "[Petitioners'] suggested method of calculating fees is based strictly on a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Under this method no consideration is given for the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues." No. 75–CV–87–C, p. 7 (WD Mo., Jan. 23, 1981), Record 220.

Finding that respondents "have obtained relief of significant import," *id.*, at 231, the District Court awarded a fee of $133,332.25. This award differed from the fee request in two respects. First, the court reduced the number of hours claimed by one attorney by 30 percent to account for his inexperience and failure to keep contemporaneous records. Second, the court declined to adopt an enhancement factor to increase the award.

The Court of Appeals for the Eighth Circuit affirmed on the basis of the District Court's memorandum opinion and order. 664 F. 2d 294 (1981). We granted certiorari, 455 U. S. 988 (1982), and now vacate and remand for further proceedings.

II

In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240 (1975), this Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary. In response Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, authorizing the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation. The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H. R. Rep. No. 94–1558, p. 1 (1976). Accordingly, a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Rep. No. 94–1011, p. 4 (1976) (quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)).[2]

The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to 12 factors set forth in *Johnson* v. *Georgia High-*

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[2] A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H. R. Rep. No. 94–1558, p. 7 (1976); *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421 (1978) ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

READEX FICHE

way Express, Inc., 488 F. 2d 714 (CA5 1974).[3] The Senate Report cites to *Johnson* as well and also refers to three District Court decisions that "correctly applied" the 12 factors.[4] One of the factors in *Johnson*, "the amount involved and the results obtained," indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded. The importance of this relationship is confirmed in varying degrees by the other cases cited approvingly in the Senate Report.

In *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974), aff'd, 550 F. 2d 464 (CA9 1977), rev'd on other grounds, 436 U. S. 547 (1978), the plaintiffs obtained a declaratory judgment, then moved for a preliminary injunction. After the defendants promised not to violate the judgment, the motion was denied. The District Court awarded attorney's fees for time spent pursuing this motion because the plaintiffs "substantially advanced their clients' interests" by obtaining "a significant concession from defendants as a result of their motion." 64 F. R. D., at 684.

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[3] The 12 factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d, at 717–719. These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2–106 (1980).

[4] "It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E. P. D. ¶ 9444 (CD Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (WDNC 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis*, *supra*; *Stanford Daily*, *supra* at 684." S. Rep. No. 94–1011, p. 6 (1976).

In *Davis* v. *County of Los Angeles*, 8 E. P. D. ¶9444 (CD Cal. 1974), the plaintiffs won an important judgment requiring the Los Angeles County Fire Department to undertake an affirmative-action program for hiring minorities. In awarding attorney's fees the District Court stated:

> "It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." *Id.*, at 5049.

Similarly, the District Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483, 484 (WDNC 1975), based its fee award in part on a finding that "[t]he results obtained were excellent and constituted the total accomplishment of the aims of the suit," despite the plaintiffs' losses on "certain minor contentions."

In each of these three cases the plaintiffs obtained essentially complete relief. The legislative history, therefore, does not provide a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success. Consistent with the legislative history, Courts of Appeals generally have recognized the relevance of the results obtained to the amount of a fee award. They have adopted varying standards, however, for applying this principle in cases where the plaintiff did not succeed on all claims asserted.[5]

In this case petitioners contend that "an award of attorney's fees must be proportioned to be consistent with the extent to which a plaintiff has prevailed, and only time reasonably expended in support of successful claims should be compensated." Brief for Petitioners 24. Respondents agree that a plaintiff's success is relevant, but propose a less stringent standard focusing on "whether the time spent prosecuting [an unsuccessful] claim in any way contributed to the ultimate results achieved." Brief for Respondents 46. Both parties acknowledge the discretion of the district court in this area. We take this opportunity to clarify the proper relationship of the results obtained to an award of attorney's fees.[6]

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[5] Some Courts of Appeals have stated flatly that plaintiffs should not recover fees for any work on unsuccessful claims. See, *e. g.*, *Bartholomew* v. *Watson*, 665 F. 2d 910, 914 (CA9 1982); *Muscare* v. *Quinn*, 614 F. 2d 577, 579–581 (CA7 1980); *Hughes* v. *Repko*, 578 F. 2d 483, 486–487 (CA3 1978). Others have suggested that prevailing plaintiffs generally should receive a fee based on hours spent on all nonfrivolous claims. See, *e. g.*, *Sherkow* v. *Wisconsin*, 630 F. 2d 498, 504–505 (CA7 1980); *Northcross* v. *Board of Educ. of Memphis City Schools*, 611 F. 2d 624, 636 (CA6 1979), cert. denied, 447 U. S. 911 (1980); *Brown* v. *Bathke*, 588 F. 2d 634, 636–637 (CA8 1978). Still other Courts of Appeals have held that recovery of a fee for hours spent on unsuccessful claims depends upon the relationship of those hours expended to the success achieved. See, *e. g.*, *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401–402, n. 18, 641 F. 2d 880, 891–892, n. 18 (1980) (en banc); *Jones* v. *Diamond*, 636 F. 2d 1364, 1382 (CA5) (en banc), cert. dism'd, 453 U. S. 950 (1981); *Gurule* v. *Wilson*, 635 F. 2d 782, 794 (CA10 1980) (opinion on rehearing); *Lamphere* v. *Brown Univ.*, 610 F. 2d 46, 47 (CA1 1979).

[6] The parties disagree as to the results obtained in this case. Petitioners believe that respondents "prevailed only to an extremely limited degree." Brief for Petitioners 22. Respondents contend that they "prevailed on practically every claim advanced." Brief for Respondents 23. As discussed in Part IV, *infra*, we leave this dispute for the District Court on remand.

III

A

A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988.[7] The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978).[8] This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

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[7] As we noted in *Hanrahan* v. *Hampton*, 446 U. S. 754, 758, n. 4 (1980) *(per curiam)*, "[t]he provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a–3(b) and 2000e–5(k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U. S. C. § 1973*l*(e)." The legislative history of § 1988 indicates that Congress intended that "the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94–1011, p. 4 (1976). The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party."

[8] See also *Busche* v. *Burkee*, 649 F. 2d 509, 521 (CA7 1981), cert. denied, 454 U. S. 897 (1981); *Sethy* v. *Alameda County Water Dist.*, 602 F. 2d 894, 897–898 (CA9 1979) *(per curiam)*. Cf. *Taylor* v. *Sterrett*, 640 F. 2d 663, 669 (CA5 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought").

The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S. Rep. No. 94–1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401, 641 F. 2d 880, 891 (1980) (en banc) (emphasis in original).

B

The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."[9] This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants—often an institution and its officers, as in this case—counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." *Davis* v. *County of Los Angeles*, 8 E. P. D., at 5049. The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.[10]

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[9] The district court also may consider other factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717–719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. See *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 400, 641 F. 2d 880, 890 (1980) (en banc).

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See *Davis* v. *County of Los Angeles*, *supra*, at 5049. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.[11]

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[10] If the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it. See n. 2, *supra*.

[11] We agree with the District Court's rejection of "a mathematical approach comparing the total number of issues in the case with those actually

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. In this case, for example, the District Court's award of fees based on 2,557 hours worked may have been reasonable in light of the substantial relief obtained. But had respondents prevailed on only one of their six general claims, for example the claim that petitioners' visitation, mail, and telephone policies were overly restrictive, see n. 1, *supra*, a fee award based on the claimed hours clearly would have been excessive.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce

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prevailed upon." Record 220. Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.

the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

C

A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked, see *supra*, at 434, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.[12]

We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.

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[12] We recognize that there is no certain method of determining when claims are "related" or "unrelated." Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures. See *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279 (CA1 1978) ("As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims").

IV

In this case the District Court began by finding that "[t]he relief [respondents] obtained at trial was substantial and certainly entitles them to be considered prevailing . . . , without the need of examining those issues disposed of prior to trial in order to determine which went in [respondents'] favor." Record 219. It then declined to divide the hours worked between winning and losing claims, stating that this fails to consider "the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues." *Id.*, at 220. Finally, the court assessed the "amount involved/results obtained" and declared: "Not only should [respondents] be considered prevailing parties, they are parties who have obtained relief of significant import. [Respondents'] relief affects not only them, but also numerous other institutionalized patients similarly situated. The extent of this relief clearly justifies the award of a reasonable attorney's fee." *Id.*, at 231.

These findings represent a commendable effort to explain the fee award. Given the interrelated nature of the facts and legal theories in this case, the District Court did not err in refusing to apportion the fee award mechanically on the basis of respondents' success or failure on particular issues.[13] And given the findings with respect to the level of respondents' success, the District Court's award may be consistent with our holding today.

We are unable to affirm the decisions below, however, because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award.[14] The court's finding that "the [significant] extent of the relief clearly justifies the award of a reasonable attorney's fee" does not answer the question of what is "reasonable" in light of that level of success.[15] We

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[13] In addition, the District Court properly considered the reasonableness of the hours expended, and reduced the hours of one attorney by 30 percent to account for his inexperience and failure to keep contemporaneous time records.

[14] The District Court expressly relied on *Brown* v. *Bathke*, 588 F. 2d 634 (CA8 1978), a case we believe understates the significance of the results

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obtained. In that case a fired schoolteacher had sought reinstatement, lost wages, $25,000 in damages, and expungement of derogatory material from her employment record. She obtained lost wages and the requested expungement, but not reinstatement or damages. The District Court awarded attorney's fees for the hours that it estimated the plaintiff's attorney had spent on the particular legal issue on which relief had been granted. The Eighth Circuit reversed. It stated that the results obtained may be considered, but that this factor should not "be given such weight that it reduces the fee awarded to a prevailing party below the 'reasonable attorney's fee' authorized by the Act." *Id.*, at 637. The court determined that the unsuccessful issues that had been raised by the plaintiff were not frivolous, and then remanded the case to the District Court. *Id.*, at 638.

Our holding today differs at least in emphasis from that of the Eighth Circuit in *Brown*. We hold that the extent of a plaintiff's success is a crucial factor that the district courts should consider carefully in determining the amount of fees to be awarded. In *Brown* the plaintiff had lost on the major issue of reinstatement. The District Court found that she had "'obtained only a minor part of the relief she sought.'" *Id.*, at 636. In remanding the Eighth Circuit implied that the District Court should not withhold fees for work on unsuccessful claims unless those claims were frivolous. Today we hold otherwise. It certainly was well within the *Brown* District Court's discretion to make a limited fee award in light of the "minor" relief obtained.

[15] The dissent errs in suggesting that the District Court's opinion would have been acceptable if merely a single word had been changed. See *post*, at 451. We note, for example, that the District Court did not determine whether petitioners' unilateral increase in staff levels was a result of the litigation. Petitioners asserted that 70%–80% of the attorney time in the case was spent on the question of staffing levels at the Forensic Unit. Memorandum in Opposition to Plaintiffs' Request for an Award of Attorneys' Fees, Expenses and Costs 30. If this is true, and if respondents' lawsuit was not a catalyst for the staffing increases, then respondents' failure to prevail on their challenge to the staffing levels would be material in determining whether an award based on over 2,500 hours expended was justifiable in light of respondents' actual success. The District Court's failure to consider this issue would not have been obviated by a mere conclusory statement that this fee was reasonable in light of the success obtained.

emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

V

We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U. S. C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained. On remand the District Court should determine the proper amount of the attorney's fee award in light of these standards.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought. It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim under 42 U. S. C. § 1988 as a lawyer would be required to show if his own client challenged the fees. A district judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

A claim for legal services presented by the prevailing party to the losing party pursuant to § 1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate "billing judgment," *ante*, at 434, and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for a payment under § 1988. That statute requires the losing party in a civil rights action to bear the cost of his adversary's attorney and there is, of course, no relationship of trust and confidence between the adverse parties. As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court today holds that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U. S. C. § 1988." *Ante*, at 440. I agree with the Court's carefully worded statement because it is fully consistent with the purpose of § 1988 as well as the interpretation of that statute reached by the Courts of Appeals. I also agree that plaintiffs may receive attorney's fees for cases in which "'they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,'" *ante*, at 433, quoting *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978), and that plaintiffs may receive fees for all hours reasonably spent litigating a case even if they do not prevail on every claim or legal theory, see *ante*, at 434–435.

Regretfully, however, I do not join the Court's opinion. In restating general principles of the law of attorney's fees, the Court omits a number of elements crucial to the calculation of attorney's fees under § 1988. A court that did not take account of those additional elements in evaluating a claim for attorney's fees would entirely fail to perform the task Congress has entrusted to it, a task that Congress—I think rightly—has deemed crucial to the vindication of individuals' rights in a society where access to justice so often requires the services of a lawyer.

Furthermore, whether one considers all the relevant factors or merely the relationship of fees to results obtained, the District Court in this case awarded a fee that was well within the court's zone of discretion under § 1988, and it explained the amount of the fee meticulously. The Court admits as much. See *ante*, at 438. Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988. Where, as here, a district court has awarded a fee that comes within the range of possible fees that the facts, history, and results of the case permit, the appellate court has a duty to affirm the award promptly.

I

In *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 269 (1975), this Court held th[illegible]t was beyond the competence of judges to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others." Congress, however, has full authority to make such decisions, and it responded to the challenge of *Alyeska* by doing the "picking and choosing" itself. Its legislative solution legitimates the federal common law of attorney's fees that had developed in the years before *Alyeska*[1] by specifying when and to whom fees are to be available.[2] Section 1988 manifests a finely balanced con-

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[1] See cases cited 421 U. S., at 284–285 (MARSHALL, J., dissenting). See also S. Rep. No. 94–1011, p. 6 (1976) ("This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's . . . decision").

[2] Because of this selectivity, statutory attorney's fee remedies such as those created by § 1988 and its analogues bear little resemblance to either common-law attorney's fee rule: the "American Rule," under which the parties bear their own attorney's fees no matter what the outcome of a case, or the "English Rule," under which the losing party, whether plaintiff or defendant, pays the winner's fees. They are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation. This fundamental distinction has often been ignored. See *ante*, at 429; *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S., at 247.

For certain rights selected by Congress, § 1988 facilitates litigation by plaintiffs and encourages them to reject half-measure compromises, see *New York Gaslight Club* v. *Carey*, 447 U. S. 54, 63 (1980); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam)*, while at the same time it gives defendants strong incentives to avoid arguable civil rights violations in the first place and to make concessions in hope of an early settlement, see *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 407, 641 F. 2d 880, 897 (1980) (en banc); *Dennis* v. *Chang*, 611 F. 2d 1302, 1307 (CA9 1980). Civil rights plaintiffs with meritorious claims "appear before the court cloaked in a mantle of public interest." H. R. Rep. No. 94–1558, p. 6 (1976) (citing *United States Steel Corp.* v. *United States*, 519 F. 2d 359, 364 (CA3 1975)). Congress has granted them a statutory right to attorney's fees in addition to any rights they have under fees rules of general applicability. *Newman* v. *Piggie Park Enterprises, supra*, at 402, n. 4; see *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 416–417 (1978). Both of the traditional rules reflect the assumption that plaintiff and defendant approach litigation on a more or less equal basis. They leave the parties to private, essentially symmetrical calculations as to whether litigation—including the attorney's fees it entails—represents a better investment than compromise and settlement or simply acceding to the opposing party's demands. Of course, the parties approach those cal-gressional purpose to provide plaintiffs asserting specified federal rights with "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976) (hereinafter Senate Report); cf. H. R. Rep. No. 94-1558, p. 9 (1976) (hereinafter House Report).[3] The Court today emphasizes those aspects of judicial discretion necessary to prevent "windfalls," but lower courts must not forget the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them.

In enacting § 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned.[4]

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culations with different risk preferences and financial positions, and the principal difference between the two rules is that the English Rule, by enhancing the cost of losing after litigation, gives the party with superior ability to undertake risk more of a tactical advantage than does the American Rule. But—in theory, at least—neither common-law rule systematically favors plaintiffs over defendants, or vice versa.

[3] The portion of § 1988 at issue in this case states:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of [Title 42], title IX of Public Law 92-318 . . . or title VI of the Civil Rights Act of 1964, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641.

Section 1988 was drafted based on Congress' experience with over 50 fee-shifting provisions in other statutes, dating back to Reconstruction-era civil rights statutes, see Senate Report 3-4; *Alyeska Pipeline Co.* v. *Wilderness Society*, *supra*, at 260, n. 33.

[4] For most private-law claims, the public interest lies primarily in providing a neutral, easily available forum for resolving the dispute, and a plaintiff's choice to compromise a claim or to forgo it altogether, based on his private calculation that what he stands to gain does not justify the cost of pursuing his claim, is of little public concern. But, in enacting § 1988, Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over

> "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
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> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court." Senate Report 2.

See House Report 1–3.[5] Congress could, of course, have provided public funds or Government attorneys for litigating private civil rights claims, but it chose to "limi[t] the growth of the enforcement bureaucracy," Senate Report 4, by con-

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and above the value of a civil rights remedy to a particular plaintiff. Simply put, Congress decided that it would be better to have more vigorous enforcement of civil rights laws than would result if plaintiffs were left to finance their own cases.

[5] Congress had other reasons as well to believe that civil rights plaintiffs would often be unable to pay for the desirable level of law enforcement themselves. Civil rights remedies often benefit a large number of persons, many of them not involved in the litigation, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them. Cf. *Hall* v. *Cole*, 412 U. S. 1, 5–7 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 396 (1970) (finding nonstatutory awards under traditional "common fund" exception to the American Rule appropriate for this reason). This problem is compounded by the facts that monetary damages are often not an important part of the recovery sought under the statutes enumerated in § 1988, cf. *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, at 402, and that doctrines of official immunity often limit the availability of damages against governmental defendants, see House Report 9, and n. 17.

tinuing to rely on the private bar[6] and by making defendants bear the full burden of paying for enforcement of their civil rights obligations.[7]

Yet Congress also took steps to ensure that § 1988 did not become a "relief fund for lawyers." 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy). First, it limited fee awards to "prevailing" plaintiffs, rather than allowing fees for anyone who litigated a bona fide claim in good faith, see House Report 6–8, and it expressly reaffirmed the common-law doctrine that attorney's fees could be awarded *against* plaintiffs who litigated frivolous or vexatious claims, see *id.*, at 6–7; *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 416–417 (1978). It also left district courts with discretion to set the precise award in individual cases and to deny fees entirely in "special circumstances" when an award would be "unjust," even if the plaintiff prevailed, see Senate Report 4; House Report 6; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam).*

> "[A] key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again, the Committee

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[6] This case reflects the fact that Congress has provided public funding to some limited extent through a number of programs such as the Legal Services Corporation: respondents' attorneys are associated with Legal Services of Eastern Missouri, Inc. They may not, however, use the money they receive from the Federal Government for cases in which fees are available. See 42 U. S. C. § 2996f(b)(1). For purposes of § 1988, such attorneys should be paid as if they were in private practice, in order both to avoid windfalls to defendants and to free public resources for other types of law enforcement. See *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S., at 70, n. 9; *Copeland* v. *Marshall*, 205 U. S. App. D. C., at 409–410, 641 F. 2d, at 899–900; *Rodriguez* v. *Taylor*, 569 F. 2d 1231, 1248 (CA3 1977).

[7] Congress' imposition of liability for attorney's fees under § 1988 also represents a decision to abrogate the sovereign immunity of the States in order to accomplish the purposes of the Fourteenth Amendment. See Senate Report 5; *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976); *Maher* v. *Gagne*, 448 U. S. 122, 128–129 (1980).

adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions." House Report 8 (footnote omitted).

At a number of points, the legislative history of § 1988 reveals Congress' basic goal that attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in civil rights cases (and hence the funds out of which their clients would pay legal fees) would seldom be equivalent to recoveries in most private-law litigation. Thus, the Senate Report specifies that fee awards under § 1988 should be equivalent to fees "in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report 6. Furthermore, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Ibid.*

As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market in non-civil-rights cases, see generally *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 400–410, 641 F. 2d 880, 890–900 (1980) (en banc), both by awarding them market-rate fees, *id.*, at 409, 641 F. 2d, at 899, and by awarding fees only for time *reasonably* expended, *id.*, at 391, 641 F. 2d, at 881. If attorneys representing civil rights plaintiffs do not expect to receive full compensation for their efforts when they are successful, or if they feel they can "lard" winning cases with additional work solely to augment their fees, the balance struck by § 1988 goes awry.

The Court accepts these principles today. As in litigation for fee-paying clients, a certain amount of "billing judgment" is appropriate, taking into account the fact that Congress did not intend fees in civil rights cases, unlike most private-law litigation, to depend on obtaining relief with substantial monetary value. Where plaintiffs prevail on some claims and lose on others, the Court is correct in holding that the extent of their success is an important factor for calculating fee awards. Any system for awarding attorney's fees that did not take account of the relationship between results and fees would fail to accomplish Congress' goal of checking insubstantial litigation.

At the same time, however, courts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief. As the Court admits, "[s]uch a lawsuit cannot be viewed as a series of discrete claims." *Ante*, at 435. And even where two claims apparently share no "common core of facts" or related legal concepts, see *ibid.*, the actual work performed by lawyers to develop the facts of both claims may be closely intertwined. For instance, in taking a deposition of a state official, plaintiffs' counsel may find it necessary to cover a range of territory that includes both the successful and the unsuccessful claims. It is sometimes virtually impossible to determine how much time was devoted to one category or the other, and the incremental time required to pursue both claims rather than just one is likely to be small.

Furthermore, on many occasions awarding counsel fees that reflect the full market value of their time will require paying more than their customary hourly rates. Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference, however, reflects the time-value of money and the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate. Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case.

Therefore, district courts should not end their fee inquiries when they have multiplied a customary hourly rate times the reasonable number of hours expended, and then checked the product against the results obtained. They should also consider both delays in payment and the prelitigation likelihood that the claims which did in fact prevail would prevail.[8] *Copeland* v. *Marshall*, *supra*, at 402–403, 641 F. 2d, at 892–893; *Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 638 (CA6 1979); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F. 2d 102, 117 (CA3 1976). These factors are potentially relevant in every case. Even if the results obtained do not justify awarding fees for all the hours spent on a particular case, no fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand.

II

Setting to one side theoretical issues about how district courts should approach attorney's fees questions under

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[8] Thus, the Court's opinion should not be read to imply that "exceptional success" provides the only basis for awarding a fee higher than the reasonable rate times the reasonable number of hours. See *ante*, at 435. To the contrary, the Court expressly approves consideration of the full range of *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), factors. See *infra*, at 450–451. If the rate used in calculating the fee does not already include some factor for risk or the time-value of money, it ought to be enhanced by some percentage figure. By the same token, attorneys need not obtain "excellent" results to merit a fully compensatory fee, see *ante*, at 435; merely prevailing to some significant extent entitles them to full compensation for the work reasonably required to obtain relief. See *infra*, at 452, and n. 9.

§ 1988, I fear the Court makes a serious error in vacating the judgment in this case and remanding for further proceedings. There is simply no reason for another round of litigation between these parties, and the lower courts are in no need of guidance from us.

A

The Court admits that the District Court made a "commendable effort" to explain the fee award and that the award "may be consistent" with today's opinion. *Ante*, at 438. It professes to be "unable to affirm" solely because the District Court's finding that "[t]he extent of this relief clearly justifies the award of a reasonable attorney's fee," App. to Pet. for Cert. A–16, is not accompanied by a further finding as to "what is 'reasonable' in light of that level of success." *Ante*, at 438–439.

Even if the District Court had been silent on the reasonableness of the amount of its fee award, it would be difficult to imagine why this Court would presume, as it apparently does, that a federal judge had awarded an *unreasonable* fee without explaining how such a result was compelled. In any event, the District Court stated expressly:

> "The Court concludes that in this case, the entire award made to plaintiffs constitutes a reasonable attorney's fee. No portion of it can be characterized as a penalty or damage award against the state of Missouri." App. to Pet. for Cert. A–11.

The District Court also addressed each of the factors mentioned in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), discussed by the Court *ante*, at 429–430, under the general rubric "Reasonableness of the Fee." App. to Pet. for Cert. A–11—A–18. It explained why it was not enhancing respondents' fee to account for the uncertainty factor, *id.*, at A–15—A–16, and it discounted one attorney's hours by 30% to yield "a reasonable claim of time," *id.*, at

A–13. The District Court had this to say under the subheading "Amount Involved/Results Obtained":

> "The significance of this case cannot be measured in terms of dollars and cents. It involves the constitutional and civil rights of the plaintiff class and resulted in a number of changes regarding their conditions and treatment at the state hospital. Not only should plaintiffs be considered prevailing parties, they are parties who have obtained relief of significant import. Plaintiffs' relief affects not only them, but also numerous other institutionalized patients similarly situated. The extent of this relief clearly justifies the award of a reasonable attorney's fee." *Id.*, at A–16.

It is clear from the context that the District Court regarded the fee it was awarding as reasonable compensation for the results obtained. Simply changing the word "a" to "this," in the last sentence quoted, would provide the additional finding the Court demands.

B

No more significant legal error requires today's judgment. The Court notes that the District Court relied on *Brown* v. *Bathke*, 588 F. 2d 634 (CA8 1978), an opinion the "emphasis" of which the Court regards as misplaced. See *ante*, at 438–439, n. 14. What the Court finds suspicious in *Brown* is the implication that a district court must award attorney's fees for all work "reasonably calculated to advance a client's interest," *i. e.*, all nonfrivolous claims, whenever the client satisfies the "prevailing party" test. See 588 F. 2d, at 637–638. The District Court did not, however, refer to the language criticized by the Court. Rather, it cited a footnote in *Brown* for the proposition that "mechanical division of claimed hours . . . ignores the interrelated nature of many prevailing and non-prevailing claims." App. to Pet. for Cert. A–7, citing 588 F. 2d, at 637, n. 5. The remainder of the *Brown* footnote makes clear that the court was concerned with related legal theories, only one of which ultimately becomes the basis for relief. To that extent, *Brown* is perfectly consistent with today's opinion. See *ante*, at 434–436, and n. 11. The Court of Appeals for the Eighth Circuit, in its brief, unpublished memorandum affirming the District Court, did not cite *Brown* at all. App. to Pet. for Cert. A–1—A–2.

Perhaps if the questionable language in *Brown* were being misapplied in other cases from the Eighth Circuit, or if courts in some other circuit were misinterpreting § 1988 in light of precedents with similar implications, today's result would have some instructive value. But such is not the case. The Court of Appeals for the Eighth Circuit has never applied *Brown* in the manner the Court fears. Rather, its published opinions following *Brown* have made clear that, although it is an abuse of discretion to deny fees entirely to any plaintiff who has crossed the "prevailing party" threshold, district courts should consider the degree of plaintiffs' success in setting a fee award. See, *e. g.*, *Williams* v. *Trans World Airlines, Inc.*, 660 F. 2d 1267, 1274 (1981); *United Handicapped Federation* v. *Andre*, 622 F. 2d 342 (1980) (rejecting claim for over $200,000 in fees and setting $10,000 limit on award because of limited success in case); *Oldham* v. *Ehrlich*, 617 F. 2d 163, 168, n. 9 (1980); *Cleverly* v. *Western Electric Co.*, 594 F. 2d 638, 642 (1979).

The law in other Circuits is substantially identical. Federal Courts of Appeals have adopted a two-stage analysis, whereby plaintiffs who obtain any significant relief are considered "prevailing parties," and District Courts are directed to take into consideration the overall degree of a plaintiff's success, and the extent to which work on claims on which no relief was obtained contributed to that success, in setting the exact amount of the award due. The mere fact that plaintiffs do not prevail on every claim does not preclude an award of fees for all work reasonably performed,[9] but it is rarely an abuse of discretion to refuse to award fees for work done on nonprevailing claims that are not closely related to the relief obtained. See, *e. g.*, *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F. 2d 149, 163–165 (CA7 1981); *Jones* v. *Diamond*, 636 F. 2d 1364, 1382 (CA5 1981) (en banc); *Lamphere* v. *Brown University*, 610 F. 2d 46, 47 (CA1 1979); *EEOC* v. *Safeway Stores, Inc.*, 597 F. 2d 251 (CA10 1979); cf. *Copeland* v. *Marshall*, 205 U. S. App. D. C., at 401–402, and n. 18, 641 F. 2d, at 891–892, and n. 18. Many of the same courts, however, have also stressed Congress' clearly expressed intent that the apparent *monetary* value of the relief obtained should not be the measure of success in a civil rights case, and they have recognized that in many cases various claims are essentially part and parcel of a single attempt to establish and vindicate the plaintiffs' rights. See, *e. g.*, *Copeland* v. *Marshall*, *supra; Gurule* v. *Wilson*, 635 F. 2d 782, 794 (CA10 1981) (as modified en banc); *Nadeau* v. *Helgemoe*, 581 F. 2d 275 (CA1 1978).

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[9] Both the Senate and House Reports make clear Congress' conclusion that success on every claim is not necessary. See *ante*, at 430–431, and

Evaluation of the interrelatedness of several claims within a single lawsuit, and of the legal work done on those claims, is

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n. 4. In addition, in its discussion of awards before final judgment, the Senate Report states:

"In appropriate circumstances, counsel fees under [§ 1988] may be awarded *pendente lite*. See *Bradley* v. *School Board of the City of Richmond*, 416 U. S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, *even when he ultimately does not prevail on all issues*." Senate Report 5 (emphasis added).

See also *Mills* v. *Electric Auto-Lite Co.*, 396 U. S., at 392 (allowing fees *pendente lite* in suit which "has not yet produced, and may never produce, a monetary recovery," an issue still to be tried).

The House Report notes that "courts have also awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief." House Report 8 (citing *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (CA8 1970), and *Reed* v. *Arlington Hotel Co.*, 476 F. 2d 721 (CA8 1973)). Note that in *Reed* the Court of Appeals awarded "reasonable attorney's fees, including services for this appeal," although the appellant obtained no significant relief at all on a major issue, either before the trial court or on appeal. See *id.*, at 726.

most appropriately a task for the district court that heard and decided the case, subject to appellate review for abuse of discretion. As the Court implicitly recognizes, the case before us manifests no clear abuse of discretion. Although plaintiffs obtained only part of the specific injunctive relief they requested, the District Court's opinion on the merits both confirmed the existence of the constitutional right to minimally adequate treatment they claimed, App. 173–179, and established strict standards for staffing, treatment plans, and environment, against which the future conduct of defendants and other state mental health authorities will be measured, *id.*, at 188–195. To a large extent, the District Court's opinion fixed plaintiffs' entitlement to improvements instituted by defendants during the course of litigation. See *id.*, at 192–193 (treatment plans), 190–191 (staff); compare Deposition of H. Bratkowski 12–13, 39, reprinted in Brief in Opposition 8, n. 10, 12, with App. 106–114, 120–121 (increase in staff during litigation). It is thus entirely understandable that the District Court considered respondents to have prevailed to an extent justifying fees for all hours reasonably spent, subject to one substantial reduction of over 300 hours for wasteful litigation practices, see *ante*, at 438, n. 13.

C

To remain faithful to the legislative objectives of § 1988, appellate courts, including this Court, should hesitate to prolong litigation over attorney's fees after the merits of a case have been concluded. Congress enacted § 1988 solely to make certain that attorneys representing plaintiffs whose rights had been violated could expect to be paid, not to spawn litigation, however interesting, over which claims are "related" or what constitutes optimal documentation for a fees request. Paragraph-by-paragraph scrutiny of the explanations for specific exercises of the district courts' broad discretion under § 1988 serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets.[10]

If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide clearly inadequate compensation to the attorneys on the case or so high as to constitute an unmistakable windfall. See, *e. g., Gurule* v. *Wilson, supra,* at 792; *Furtado* v. *Bishop,* 635 F. 2d 915, 923, n. 16 (CA1 1980). Any award that falls between those rough poles substantially accomplishes Congress' objectives.[11] More exacting review, for which there is no clear mandate in the statute or its legislative history, frustrates rather than advances the policies of § 1988.

In systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate. Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after. Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake. Within the confines of individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. Defendants—who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel—have much to gain simply by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up.

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[10] Cf. Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Colum. L. Rev. 346, 352 (1980).

[11] Congress having delegated responsibility for setting a "reasonable" attorney's fee to the court that tried the case, reviewing courts, as a matter of good judicial policy, should not disturb the trial court's solution to the problem of balancing the many factors involved unless the end product falls outside of a rough "zone of reasonableness," or unless the explanation articulated is patently inadequate. Cf. *Permian Basin Area Rate Cases,* 390 U. S. 747, 767 (1968).

This case itself provides a perfect example. Petitioners, who have little prospect of substantially reducing the amount of fees they will ultimately have to pay, have managed to delay paying respondents what they owe for over two years, after all other litigation between them had ended, with further delay to come. Respondents' attorneys can hardly be certain that they will ever be compensated for their efforts here in defending a judgment that five Justices find deficient only in minor respects. Apart from the result in this case, the prospect of protracted appellate litigation regarding attorney's fee awards to prevailing parties is likely to discourage litigation by victims of other civil rights violations in Missouri and elsewhere. The more obstacles that are placed in the path of parties who have won significant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk of representing civil rights plaintiffs seeking equivalent relief in other cases. It may well become difficult for civil rights plaintiffs with less-than-certain prospects for success to obtain attorneys. That would be an anomalous result for judicial construction of a statute enacted "to attract competent counsel in cases involving civil and constitutional rights," House Report 9; cf. *Copeland* v. *Marshall*, 205 U. S. App. D. C., at 400, 641 F. 2d, at 890 (fee awards intended to provide "an incentive to competent lawyers to undertake Title VII work").

D

Few, if any, differences about the basic framework of attorney's fees law under § 1988 divide the Court today. Apart from matters of nuance and tone, largely tangential to the case at hand, I object to only two aspects of today's judgment. First, I see no reason for us to have devoted our scarce time to hearing this case, and I fear that the sudden appearance of a new Supreme Court precedent in this area will unjustifiably provoke new litigation and prolong old litigation over attorney's fees. More fundamentally, the principles that the Court and I share should have led us, once we had granted a writ of certiorari, to affirm the judgment below. To that extent, I dissent.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CAMPBELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-1983. Argued February 28, 1983—Decided May 16, 1983

To be entitled to disability benefits under the Social Security Act a person must not only be unable to perform his former work but must also be unable, considering his age, education, and work experience, to perform any other kind of gainful work that exists in the national economy. Prior to 1978, in cases where a claimant was found unable to pursue his former occupation, but his disability was not so severe as to prevent his pursuing any gainful work, the Secretary of Health and Human Services (Secretary) relied on vocational experts to determine whether jobs existed in the national economy that the claimant could perform. In 1978, to improve the uniformity and efficiency of such determinations, the Secretary promulgated medical-vocational guidelines setting forth rules to establish whether such jobs exist. If a claimant's qualifications correspond to the job requirements identified by a rule, the guidelines direct a conclusion as to whether work exists that the claimant can perform. If such work exists, the claimant is not considered disabled. After respondent's application for disability benefits was denied, she requested a hearing before an Administrative Law Judge, who, relying on the guidelines, found that jobs existed that a person of respondent's qualifications could perform, and accordingly concluded that she was not disabled. Both the Social Security Appeals Council and the District Court upheld this determination. But the Court of Appeals reversed, holding that the guidelines did not provide adequate evidence of specific alternative jobs that respondent could perform, that in the absence of such evidence respondent was deprived of any chance to present evidence that she could not perform the types of jobs identified by the guidelines, and that therefore the determination that she was not disabled was not supported by substantial evidence.

Held: The Secretary's use of the medical-vocational guidelines to determine a claimant's right to disability benefits does not conflict with the Social Security Act, nor are the guidelines arbitrary or capricious. Pp. 465–470.

(a) While the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence, this does not bar the Secretary from relying on rulemaking to resolve certain classes of issues. The determination as to whether jobs exist that a person having the claimant's qualifications could perform requires the Secretary to determine a factual issue that is not unique to each claimant and may be resolved as fairly through rulemaking as by introducing testimony of vocational experts at each disability hearing. To require the Secretary to relitigate the existence of jobs in the national economy at each hearing would hinder an already overburdened agency. Pp. 465–468.

(b) The principle of administrative law that when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond, is inapplicable where, as in this case, the agency has promulgated valid regulations. When the accuracy of such facts has been tested fairly during rulemaking, the rulemaking proceeding itself provides sufficient procedural protection. Pp. 468–470.

665 F. 2d 48, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 470. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 473.

John H. Garvey argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller,* and *Anne Buxton Sobol.*

Ruben Nazario argued the cause for respondent. With him on the brief were *Toby Golick* and *Jane Greengold Stevens.**

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether the Secretary of Health and Human Services may rely on published medical-vocational guidelines to determine a claimant's right to Social Security disability benefits.

I

The Social Security Act defines "disability" in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace. It provides disability benefits only to persons who are unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 81 Stat. 868, as amended, 42 U. S. C. § 423(d)(1)(A). And it specifies that a person must "not only [be] unable to do his previous work but [must be unable], considering his age, education, and work experience, [to] engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U. S. C. § 423(d)(2)(A).

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*Briefs of *amici curiae* urging affirmance were filed by *Eileen P. Sweeney* for the Gray Panthers; and by *Dan Stormer* for Tulare/Kings Counties Legal Services et al.

In 1978, the Secretary of Health and Human Services promulgated regulations implementing this definition. See 43 Fed. Reg. 55349 (1978) (codified, as amended, at 20 CFR pt. 404, subpt. P (1982)). The regulations recognize that certain impairments are so severe that they prevent a person from pursuing any gainful work. See 20 CFR § 404.1520(d) (1982) (referring to impairments listed at 20 CFR pt. 404, subpt. P, app. 1). A claimant who establishes that he suffers from one of these impairments will be considered disabled without further inquiry. *Ibid.* If a claimant suffers from a less severe impairment, the Secretary must determine whether the claimant retains the ability to perform either his former work or some less demanding employment. If a claimant can pursue his former occupation, he is not entitled to disability benefits. See § 404.1520(e). If he cannot, the Secretary must determine whether the claimant retains the capacity to pursue less demanding work. See § 404.1520(f)(1).

The regulations divide this last inquiry into two stages. First, the Secretary must assess each claimant's present job qualifications. The regulations direct the Secretary to consider the factors Congress has identified as relevant: physical ability, age, education, and work experience.[1] See 42

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[1] The regulations state that the Secretary will inquire into each of these factors and make an individual assessment of each claimant's abilities

U. S. C. § 423(d)(2)(A); 20 CFR § 404.1520(f) (1982). Second, she must consider whether jobs exist in the national economy that a person having the claimant's qualifications could perform. 20 CFR §§ 404.1520(f), 404.1566–404.1569 (1982).

Prior to 1978, the Secretary relied on vocational experts to establish the existence of suitable jobs in the national economy. After a claimant's limitations and abilities had been determined at a hearing, a vocational expert ordinarily would testify whether work existed that the claimant could perform. Although this testimony often was based on standardized guides, see 43 Fed. Reg. 9286 (1978), vocational experts frequently were criticized for their inconsistent treatment of similarly situated claimants. See *Santise* v *Schweiker*, 676 F. 2d 925, 930 (CA3 1982); J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals 78–79 (1978). To improve both the uniformity and efficiency[2] of this determination, the Secretary promulgated medical-vocational guidelines as part of the 1978 regulations. See 20 CFR pt. 404, subpt. P, app. 2 (1982).

These guidelines relieve the Secretary of the need to rely on vocational experts by establishing through rulemaking the types and numbers of jobs that exist in the national economy. They consist of a matrix of the four factors identified by Con-

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and limitations. See 20 CFR §§ 404.1545–404.1565 (1982); cf. 20 CFR § 404.944 (1982). In determining a person's physical ability, she will consider, for example, the extent to which his capacity for performing tasks such as lifting objects or his ability to stand for long periods of time has been impaired. See § 404.1545.

[2] The Social Security hearing system is "probably the largest adjudicative agency in the western world." J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals xi (1978). Approximately 2.3 million claims for disability benefits were filed in fiscal year 1981. Department of Health and Human Services, Social Security Annual Report to the Congress for Fiscal Year 1981, pp. 32, 35 (1982). More than a quarter of a million of these claims required a hearing before an administrative law judge. *Id.*, at 38. The need for efficiency is self-evident.

gress—physical ability, age, education, and work experience[3]—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy.[4] Where a claimant's qualifications correspond to the job requirements identified by a rule,[5] the guidelines direct a conclusion as to whether work exists that the claimant could perform. If such work exists, the claimant is not considered disabled.

II

In 1979, Carmen Campbell applied for disability benefits because a back condition and hypertension prevented her from continuing her work as a hotel maid. After her application was denied, she requested a hearing *de novo* before an Administrative Law Judge.[6] He determined that her back problem was not severe enough to find her disabled without further inquiry, and accordingly considered whether she retained the ability to perform either her past work or some less strenuous job. App. to Pet. for Cert. 28a. He concluded that even though Campbell's back condition prevented her from returning to her work as a maid, she retained the physical capacity to do light work. *Ibid.* In accordance with the regulations, he found that Campbell was 52 years old, that her previous employment consisted of unskilled jobs, and that she had a limited education. *Id.*, at 28a–29a. He noted that Campbell, who had been born in Panama, experienced difficulty in speaking and writing English. She was able, however, to understand and read English fairly well. App. 42. Relying on the medical-vocational guidelines, the Administrative Law Judge found that a significant number of jobs existed that a person of Campbell's qualifications could perform. Accordingly, he concluded that she was not disabled.[7] App. to Pet. for Cert. 29a.

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[3] Each of these four factors is divided into defined categories. A person's ability to perform physical tasks, for example, is categorized according to the physical exertion requirements necessary to perform varying classes of jobs—*i. e.*, whether a claimant can perform sedentary, light, medium, heavy, or very heavy work. 20 CFR § 404.1567 (1982). Each of these work categories is defined in terms of the physical demands it places on a worker, such as the weight of objects he must lift and whether extensive movement or use of arm and leg controls is required. *Ibid.*

[4] For example, Rule 202.10 provides that a significant number of jobs exist for a person who can perform light work, is closely approaching advanced age, has a limited education but who is literate and can communicate in English, and whose previous work has been unskilled.

[5] The regulations recognize that the rules only describe "major functional and vocational patterns." 20 CFR pt. 404, subpt. P, app. 2, § 200.00(a) (1982). If an individual's capabilities are not described accurately by a rule, the regulations make clear that the individual's particular limitations must be considered. See app. 2, §§ 200.00(a), (d). Additionally, the regulations declare that the administrative law judge will not apply the age categories "mechanically in a borderline situation," 20 CFR § 404.1563(a) (1982), and recognize that some claimants may possess limitations that are not factored into the guidelines, see app. 2, § 200.00(e). Thus, the regulations provide that the rules will be applied only when they describe a claimant's abilities and limitations accurately.

[6] The Social Security Act provides each claimant with a right to a *de novo* hearing. 42 U. S. C. § 405(b) (1976 ed., Supp. V); § 421(d). The regula-

This determination was upheld by both the Social Security Appeals Council, *id.*, at 16a, and the District Court for the Eastern District of New York, *id.*, at 15a. The Court of Appeals for the Second Circuit reversed. *Campbell* v. *Secretary of Dept. of Health and Human Services*, 665 F. 2d 48 (1981). It accepted the Administrative Law Judge's determination that Campbell retained the ability to do light work. And it did not suggest that he had classified Campbell's age,

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tions specify when a claimant may exercise this right. See 20 CFR §§ 404.929–404.930 (1982).

[7] The Administrative Law Judge did not accept Campbell's claim that her hypertension constituted an impairment. He found that this claim was not documented by the record and noted that her current medication appeared sufficient to keep her blood pressure under control. See App. to Pet. for Cert. 27a.

Campbell later reapplied for disability benefits and was found disabled as of January 1, 1981. See Brief for Petitioner 8, n. 7. The Secretary's subsequent decision does not moot this case since Campbell is claiming entitlement to benefits prior to January 1, 1981.

education, or work experience incorrectly. The court noted, however, that it

> "has consistently required that 'the Secretary identify specific alternative occupations available in the national economy that would be suitable for the claimant' and that 'these jobs be supported by "a job description clarifying the nature of the job, [and] demonstrating that the job does not require" exertion or skills not possessed by the claimant.'" *Id.*, at 53 (quoting *Decker* v. *Harris*, 647 F. 2d 291, 298 (CA2 1981)).

The court found that the medical-vocational guidelines did not provide the specific evidence that it previously had required. It explained that in the absence of such a showing, "the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines." 665 F. 2d, at 53. The court concluded that because the Secretary had failed to introduce evidence that specific alternative jobs existed, the determination that Campbell was not disabled was not supported by substantial evidence. *Id.*, at 54.

We granted certiorari to resolve a conflict among the Courts of Appeals.[8] *Schweiker* v. *Campbell*, 457 U. S. 1131 (1982). We now reverse.

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[8] Every other Court of Appeals addressing the question has upheld the Secretary's use of the guidelines. See *Rivers* v. *Schweiker*, 684 F. 2d 1144, 1157–1158 (CA5 1982); *McCoy* v. *Schweiker*, 683 F. 2d 1138, 1144–1146 (CA8 1982); *Torres* v. *Secretary of Health and Human Services*, 677 F. 2d 167, 169 (CA1 1982); *Santise* v. *Schweiker*, 676 F. 2d 925, 934–936 (CA3 1982); *Cummins* v. *Schweiker*, 670 F. 2d 81, 82–83 (CA7 1982); *Kirk* v. *Secretary of Health and Human Services*, 667 F. 2d 524, 529–535 (CA6 1981); *Frady* v. *Harris*, 646 F. 2d 143, 145 (CA4 1981). One Court of Appeals has agreed that the Secretary may use medical-vocational guidelines but has found that with respect to age the guidelines are arbitrary. See *Broz* v. *Schweiker*, 677 F. 2d 1351, 1359–1361 (CA11 1982), cert. pending, No. 82–816. The instant case does not present the issue addressed in *Broz*.

III

The Secretary argues that the Court of Appeals' holding effectively prevents the use of the medical-vocational guidelines. By requiring her to identify specific alternative jobs in every disability hearing, the court has rendered the guidelines useless. An examination of both the language of the Social Security Act and its legislative history clearly demonstrates that the Secretary may proceed by regulation to determine whether substantial gainful work exists in the national economy. Campbell argues in response that the Secretary has misperceived the Court of Appeals' holding. Campbell reads the decision as requiring only that the Secretary give disability claimants concrete examples of the kinds of factual determinations that the administrative law judge will be making. This requirement does not defeat the guidelines' purpose; it ensures that they will be applied only where appropriate. Accordingly, respondent argues that we need not address the guidelines' validity.

A

The Court of Appeals held that "[i]n failing to show suitable available alternative jobs for Ms. Campbell, the Secretary's finding of 'not disabled' is not supported by substantial evidence." 665 F. 2d, at 54. It thus rejected the proposition that "the guidelines provide adequate evidence of a claimant's ability to perform a specific alternative occupation," *id.*, at 53, and remanded for the Secretary to put into evidence "particular types of jobs suitable to the capabilities of Ms. Campbell," *id.*, at 54. The court's requirement that additional evidence be introduced on this issue prevents the Secretary from putting the guidelines to their intended use and implicitly calls their validity into question.[9] Accordingly, we think the decision below requires us to consider whether the Secretary may rely on medical-vocational guidelines in appropriate cases.

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[9] The Courts of Appeals have read the decision below as implicitly invalidating the guidelines. See *McCoy* v. *Schweiker*, *supra*, at 1145; *Torres* v. *Secretary of Health and Human Services*, *supra*, at 169; *Santise* v. *Schweiker*, *supra*, at 937, and n. 25.

The Social Security Act directs the Secretary to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. 42 U. S. C. § 405(a). As we previously have recognized, Congress has "conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act." *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43 (1981); see *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977). Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation,[10] our review is limited to determining whether the regulations promulgated exeeded the Secretary's statutory authority and whether they are arbitrary and capricious. *Herweg* v. *Ray*, 455 U. S. 265, 275 (1982); *Schweiker* v. *Gray Panthers*, *supra*, at 44.

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[10] Since Congress amended the Social Security Act in 1954 to provide for disability benefits, Pub. L. 761, § 106, 68 Stat. 1079, it repeatedly has suggested that the Secretary promulgate regulations defining the criteria for evaluating disability. See, *e. g.*, Subcommittee on the Administration of the Social Security Laws of the House Committee on Ways and Means, Administration of Social Security Disability Insurance Program: Preliminary Report, 86th Cong., 2d Sess., 17-18 (Comm. Print 1960) (requesting Secretary to develop "specific criteria for the weight to be given nonmedical factors in the evaluation of disability"); House Committee on Ways and Means, Committee Staff Report on the Disability Insurance Program, 93d Cong., 2d Sess., 6 (Comm. Print 1974) (recommending that the Secretary promulgate regulations defining disability to ease accelerating caseload); Subcommittee on Social Security of the House Committee on Ways and Means, H. R. 8076—Disability Insurance Amendment of 1977, 95th Cong., 1st Sess., 7 (Comm. Print 1977) (comments of Rep. Burke) (noting with approval that the Secretary had promised to promulgate medical-vocational guidelines to define disability). While these sources do not establish the original congressional intent, they indicate that later Congresses perceived that regulations such as the guidelines would be consistent with the statute.

We do not think that the Secretary's reliance on medical-vocational guidelines is inconsistent with the Social Security Act. It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. See 42 U. S. C. § 423(d)(2)(A) (specifying consideration of each individual's condition); 42 U. S. C. § 405(b) (1976 ed., Supp. V) (disability determination to be based on evidence adduced at hearing). But this does not bar the Secretary from relying on rulemaking to resolve certain classes of issues. The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. See *FPC* v. *Texaco Inc.*, 377 U. S. 33, 41–44 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding. See *FPC* v. *Texaco Inc.*, *supra*, at 44.

The Secretary's decision to rely on medical-vocational guidelines is consistent with *Texaco* and *Storer*. As noted above, in determining whether a claimant can perform less strenuous work, the Secretary must make two determinations. She must assess each claimant's individual abilities and then determine whether jobs exist that a person having the claimant's qualifications could perform. The first inquiry involves a determination of historic facts, and the regulations properly require the Secretary to make these findings on the basis of evidence adduced at a hearing. We note that the regulations afford claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them.[11] The second inquiry requires the Secretary to determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy. This type of general factual issue may be resolved as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing. See *American Airlines, Inc.* v. *CAB*, 123 U. S. App. D. C. 310, 319, 359 F. 2d 624, 633 (1966) (en banc).

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[11] Both *FPC* v. *Texaco Inc.*, 377 U. S. 33, 40 (1964), and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956), were careful to note that the statutory scheme at issue allowed an individual applicant to show that the rule promulgated should not be applied to him. The regulations

As the Secretary has argued, the use of published guidelines brings with it a uniformity that previously had been perceived as lacking. To require the Secretary to relitigate the existence of jobs in the national economy at each hearing would hinder needlessly an already overburdened agency. We conclude that the Secretary's use of medical-vocational guidelines does not conflict with the statute, nor can we say on the record before us that they are arbitrary and capricious.

B

We now consider Campbell's argument that the Court of Appeals properly required the Secretary to specify alternative available jobs. Campbell contends that such a showing informs claimants of the type of issues to be established at the hearing and is required by both the Secretary's regulation, 20 CFR §404.944 (1982), and the Due Process Clause.

By referring to notice and an opportunity to respond, see 665 F. 2d, at 53–54, the decision below invites the interpretation given it by respondent. But we do not think that the decision fairly can be said to present the issues she raises.[12]

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here provide a claimant with equal or greater protection since they state that an administrative law judge will not apply the rules contained in the guidelines when they fail to describe a claimant's particular limitations. See n. 5, *supra*.

[12] Respondent did not raise either her due process or her regulatory argument below. See Brief for Appellant in *Campbell* v. *Schweiker*, No. 81–6108 (CA2); Tr. of Oral Arg. 30. Nor has respondent filed a cross-petition. As she prevailed below, we could consider grounds supporting her judgment different from those on which the Court of Appeals rested its de-

The Court of Appeals did not find that the Secretary failed to give sufficient notice in violation of the Due Process Clause or any statutory provision designed to implement it. See 42 U. S. C. § 405(b) (1976 ed., Supp. V) (requiring that disability claimants be given "reasonable notice and [an] opportunity for a hearing"). Nor did it find that the Secretary violated any duty imposed by regulation. See 20 CFR § 404.944 (1982) (requiring the administrative law judge to "loo[k] fully into the issues"). Rather the court's reference to notice and an opportunity to respond appears to be based on a principle of administrative law—that when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond.[13] See 5 U. S. C. § 556(e); *McDaniel* v. *Celebrezze*, 331 F. 2d 426 (CA4 1964).

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cision. See *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970). But where the ground presented here has not been raised below we exercise this authority "only in exceptional cases." *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940). We do not think this is such a case.

Alternatively, respondent suggests that if the Administrative Law Judge had inquired conscientiously and fully into the relevant facts, as required by 20 CFR § 404.944 (1982), he would have concluded that she was not capable of performing light work. The Secretary concedes that § 404.944 requires such an inquiry, see Brief for Petitioner 42, but argues that the inquiry undertaken by the Administrative Law Judge satisfied any regulatory duty. Again respondent appears not to have presented her § 404.944 argument to the Court of Appeals, and we decline to reach it here.

[13] The Court of Appeals did not identify any basis for imposing this requirement other than its earlier decision in *Decker* v. *Harris*, 647 F. 2d 291 (CA2 1981). *Decker*, however, identified the source of this requirement more clearly. It stated: "This requirement of specificity . . . assures the claimant of adequate notice of the grounds on which his claim may be denied, providing him with an opportunity to present rebuttal evidence. See generally 3 K. Davis, Administrative Law Treatise § 15.18, at 198–206 (2d ed. 1980)." *Id.*, at 298.

In § 15.18 of his treatise, Professor Davis addresses the question of administrative or official notice of material facts in disability cases and the need for an adequate opportunity to respond. He states that an administrative law judge may take administrative notice of jobs in the national

This principle is inapplicable, however, when the agency has promulgated valid regulations. Its purpose is to provide a procedural safeguard: to ensure the accuracy of the facts of which an agency takes notice. But when the accuracy of those facts already has been tested fairly during rulemaking, the rulemaking proceeding itself provides sufficient procedural protection.[14] See, *e. g.*, *Rivers* v. *Schweiker*, 684 F. 2d 1144, 1156 (CA5 1982); *Broz* v. *Schweiker*, 677 F. 2d 1351, 1362 (CA11 1982); *Torres* v. *Secretary of Health and Human Services*, 677 F. 2d 167, 169 (CA1 1982).

IV

The Court of Appeals' decision would require the Secretary to introduce evidence of specific available jobs that respondent could perform. It would limit severely her ability to rely on the medical-vocational guidelines. We think the Secretary reasonably could choose to rely on these guidelines in appropriate cases rather than on the testimony of a vocational expert in each case. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. It merits comment, however, that the hearing respondent received, see *ante*, at 462–463, if it is in any way indicative of standard practice, reflects

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economy. He emphasizes, however, that "[a] quick remark by an ALJ that he takes official notice of availability of jobs in the national economy that would be suitable for the claimant could be unfair for lack of *sufficient specificity. The jobs should be identified, their characteristics should be stated* . . . ." § 15.18, at 204 (emphasis added). *Decker*'s reference to this treatise makes clear that the requirement of specificity derives from a principle of administrative law.

[14] Respondent does not challenge the rulemaking itself, and, as noted above, respondent was accorded a *de novo* hearing to introduce evidence on issues, such as physical and mental limitations, that require individualized consideration. See *supra*, at 462–463.

poorly on the Administrative Law Judge's adherence to what Chief Judge Godbold has called his "duty of inquiry":

> "[T]here is a 'basic obligation' on the ALJ in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a '"special duty . . . to scrupulously and conscientiously explore for all the relevant facts"' where an unrepresented claimant has not waived counsel. This duty of inquiry on the ALJ would include, in a case decided under the grids, a duty to inquire into possible nonexertional impairments and into exertional limitations that prevent a full range of work." *Broz* v. *Schweiker*, 677 F. 2d 1351, 1364 (CA11 1982).[1]

In her brief to this Court, the Secretary acknowledges that the Social Security regulations embody this duty and relies upon it in answering respondent's due process contentions. Brief for Petitioner 42 (citing *Broz* v. *Schweiker, supra)*; see 20 CFR § 404.944 (1982); *ante*, at 468, and n. 12. The Administrative Law Judge's "duty to inquire" takes on special urgency where, as here, the claimant has little education and limited fluency in English, and, given that the claimant already has a right to a hearing, the additional cost of pursuing relevant issues at the hearing is minimal.

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[1] Accord, *Thompson* v. *Schweiker*, 665 F. 2d 936, 941 (CA9 1982); *Ware* v. *Schweiker*, 651 F. 2d 408, 414 (CA5 1981); *Diabo* v. *Secretary of Health, Education and Welfare*, 200 U. S. App. D. C. 225, 229, 627 F. 2d 278, 282 (1980); *Cox* v. *Califano*, 587 F. 2d 988, 991 (CA9 1978); *Smith* v. *Secretary of Health, Education and Welfare*, 587 F. 2d 857, 860 (CA7 1978); *Gold* v. *Secretary of Health, Education and Welfare*, 463 F. 2d 38, 43 (CA2 1972). The "duty of inquiry" derives from claimants' basic statutory and constitutional right to due process in the adjudication of their claims, including a *de novo* hearing, see *Mathews* v. *Eldridge*, 424 U. S. 319, 332–335, 339 (1976); *Richardson* v. *Perales*, 402 U. S. 389, 402–404 (1971). See also *Goldberg* v. *Kelly*, 397 U. S. 254, 262–263 (1970). Inherent in the concept of a due process hearing is the decisionmaker's obligation to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts. *Goss* v. *Lopez*, 419 U. S. 565, 580 (1975).

In order to find that respondent was not disabled, the Secretary had to determine that she had the physical capacity to do "light work," compare 20 CFR pt. 404, subpt. P, app. 2, § 201.10 (1982), with *id.*, § 202.10, a determination that required a finding that she was capable of frequent lifting or carrying of objects weighing up to 10 pounds and sometimes lifting up to 20 pounds, 20 CFR § 404.1567(b) (1982). The hearing record included one disinterested doctor's report of a medical examination of respondent that concluded with the unexplained statement "Patient may return to light-duty work," App. 11, and a subsequent report by a second disinterested doctor stating that respondent could lift and carry only "up to 10 pounds," *id.*, at 32. In finding that respondent could perform "light work," the Administrative Law Judge rejected the second doctor's report as "without basis." App. to Pet. for Cert. 23a–25a. Yet he failed entirely to adduce evidence relevant to this issue at respondent's hearing. At several points during the hearing, respondent stated that she could not lift things, but the Administrative Law Judge did not question her on the subject at all,[2] nor did he make any inquiry whether by "light-duty work" the first doctor meant the same thing as the Secretary's term "light work."

The Administrative Law Judge further failed to inquire whether factors besides strength, age, or education, combined with her other impairments, rendered respondent disabled. See 20 CFR pt. 404, *supra*, § 200.00(e)(2); *ante*, at 462, n. 5. Apparently such factors could have been dispositive of the case before us: The Secretary has since determined that respondent is in fact disabled, see *ante*, at 463, n. 7, based on consideration of severe emotional complications not explored at all by the Administrative Law Judge in the hearing that led to her petition for review in this case.[3]

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[2] The following colloquy appears on the record:

"Q. Can you bend?

"A. I cannot bend. The doctor warned me not to lift weights.

"Q. Uh-huh.

"A. And—

"Q. I notice you have stood up several times since you've been in here." App. 49–50.

At no point did the Administrative Law Judge so much as ask respondent how she did her shopping, or any other question that might have elicited information on the crucial question of how much she could regularly lift.

This issue was not presented to the Court of Appeals, nor passed upon by it. See *ante*, at 468–469, n. 12. In terms of ensuring fair and accurate determinations of disability claims, the obligation that the Court of Appeals would have placed on administrative law judges was a poor substitute for good-faith performance of the "duty of inquiry" they already have. The federal courts have been successful in enforcing this duty in the past, see n. 1, *supra*, and I respectfully suggest that the Secretary insist upon its faithful performance in future cases.

JUSTICE MARSHALL, concurring in part and dissenting in part.

While I agree that the Secretary's medical-vocational guidelines are valid, I believe that this case presents the additional question whether the Administrative Law Judge fulfilled his obligation to "loo[k] fully into the issues." 20 CFR § 404.944 (1982). See *Richardson* v. *Perales*, 402 U. S. 389, 410 (1971) (at the hearing the administrative law judge is required to "ac[t] as an examiner charged with developing the facts"). I would therefore remand this case for further proceedings.

I do not agree with the Court, *ante*, at 468–469, that the decision below does not question the adequacy of the Administrative Law Judge's inquiry at the hearing. Although the Court of Appeals' opinion is not entirely clear, the court appears to have concluded that Campbell was not given an adequate opportunity to demonstrate that she was unable to perform "light work." The court explained as follows:

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[3] See App. to Brief for Respondent 2a–3a. The decision appears to have rested on evidence similar to the evidence in the record at the hearing in this case, except that the Administrative Law Judge took note that respondent was "an obese, sad individual, who had marked difficulties in sitting, standing, and walking," and he found that her severe back disorder was "complicated by an emotional overlay." *Id.*, at 3a.

> "'The key consideration in the administrative proceeding must be that the claimant be given adequate opportunity to challenge the suitability . . . of the jobs noticed. . . .' [O]ur major concern is that the claimant be given adequate notice of the nature and demands of the types of jobs allegedly available. Absent sufficient notice, the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines. This is particularly true in Ms. Campbell's case where the ALJ gave no indication of any specific 'light work' jobs that she was capable of performing . . . ." *Campbell* v. *Secretary of Dept. of Health and Human Services*, 665 F. 2d 48, 53–54 (CA2 1981), quoting *Decker* v. *Harris*, 647 F. 2d 291, 298 (CA2 1981).[1]

The Court of Appeals remanded the case for further administrative proceedings at which Campbell would be given "a listing of particular types of jobs suitable to the capabilities of Ms. Campbell." 665 F. 2d, at 54.

The Court of Appeals' concern was amply justified in light of the hearing that was conducted in this case. The central issue at respondent's hearing was whether she was capable of performing "light work."[2] If Campbell had shown that she was unable to perform "light work," she would have been entitled to disability benefits under the Secretary's guidelines. Although Campbell was afforded a hearing to determine whether she was disabled, she was never apprised of this central issue either in advance of or during the hearing. She was not represented by counsel, and the Administrative Law Judge who conducted the hearing never explained to her what "light work" entailed. Moreover, although the judge inquired at length into respondent's medical problems, he conducted little inquiry into the effect of her medical problems on her capacity to perform work. Yet reasonably complete questioning concerning the claimant's ability to function in her daily activity was essential to resolving this question in a fair manner.[3]

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[1] It was certainly not anticipated that this procedure "would limit severely [the Secretary's] ability to rely on the medical-vocational guidelines," *ante*, at 470, or "rende[r] the guidelines useless." *Ante*, at 465. The court noted simply that

"if there are [approximately 1,600 types of 'light work'] jobs available, it would not be too great a burden for the Secretary or the ALJ to specify a few suitable alternative available types of jobs so that a claimant is given an opportunity to show that she is incapable of performing those jobs. Moreover, we stress that the jobs should be specified at the hearing so that the claimant has a chance to put evidence into the record on that issue." 665 F. 2d, at 54.

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[2] "Light work" is defined in the regulations as follows:

"(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities." 20 CFR § 404.1567 (1982).

[3] The availability of medical evidence, much of which supported respondent's claim of disability, was no substitute for an examination of the claimant herself.

"[I]f the hearing is meant to be an individualized inquiry into how this claimant's functioning is impaired by his medical conditions, then that evidence must almost certainly come from the claimant himself, or from people who come in contact with him in his daily life. Since in most hearings no one other than the claimant is there to testify to his daily activities, who does not also have an interest in the success of the claim, it is imperative that ALJs draw out of the claimants, in great detail, information about how they function with their limitations. This is the crucial arena for credibility judgments by ALJs. Moreover, it seems clear that such judgments will necessarily be made, whether or not the claimant's situation is fully

The above-quoted portions of the Court of Appeals' decision demonstrate to my satisfaction that the question whether respondent received an adequate hearing is fairly raised by the decision below. It would have been well within the Court of Appeals' authority under 42 U. S. C. § 405(g) (1976 ed., Supp. V) to order a new hearing if the court concluded that the Administrative Law Judge failed to conduct an adequate inquiry.[4] That appears to be just what the court did when it remanded the case. The court required the judge to fulfill his obligation to elicit testimony concerning respondent's capacity to perform "light work" by giving her a few examples of specific types of "light work" and allowing her to explain why she is unable to perform such work.

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explored by the ALJ." Subcommittee on Social Security of the House Committee on Ways and Means, Social Security Administrative Law Judges: Survey and Issue Paper, 96th Cong., 1st Sess., 47 (Comm. Prin 1979).

[4] See, *e. g.*, *Currier* v. *Secretary of Health, Education and Welfare*, 61 F. 2d 594, 598 (CA1 1980); *Veal* v. *Califano*, 610 F. 2d 495, 497–498 (CA 1979); *Cox* v. *Califano*, 587 F. 2d 988, 990–991 (CA9 1978); *Copley* v. *Rich* *ardson*, 475 F. 2d 772, 773–774 (CA6 1973).

BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–185. Argued April 18, 1983—Decided May 16, 1983*

Held: The Court of Appeals' judgment—upholding the District Court's orders enjoining the Boston Police and Fire Departments from laying off policemen and firemen in a manner that would reduce the percentage of minority officers below the level obtaining at the commencement of the layoffs—is vacated, and the cases are remanded for consideration of mootness in light of Massachusetts' intervening enactment of legislation relating to the layoffs.

679 F. 2d 965, vacated and remanded.

John F. McMahon argued the cause for petitioners in Nos. 82–185 and 82–246 and filed briefs for petitioner in No. 82–185. *Thomas A. Barnico*, Assistant Attorney General of Massachusetts, argued the cause *pro hac vice* for petitioners in No. 82–259. With him on the briefs were *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, *E. Michael Sloman*, Assistant Attorney General, and *Marc S. Seigle*, Special Assistant Attorney General. *Kevin P. Phillips* filed a brief for petitioner in No. 82–246.

James S. Dittmar argued the cause for respondents in all cases. With him on the brief were *Judith Bernstein Tracy*, *Peggy A. Wiesenberg*, and *Gerald Gillerman*.†

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*Together with No. 82–246, *Boston Police Patrolmen's Assn., Inc.* v. *Castro et al.*; and No. 82–259, *Beecher et al.* v. *Boston Chapter, NAACP, et al.*, also on certiorari to the same court.

†Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Cooper, Carter G. Phillips, Brian K. Landsberg, Walter W. Barnett,* and *Dennis J. Dimsey* for the United States; by *Robert E. Williams, Douglas S. McDowell,* and *Daniel R. Levinson* for the Equal Employment Advisory Council; by *J. Albert*

PER CURIAM.

In these cases, the United States Court of Appeals for the First Circuit upheld the District Court's August 7, 1981, orders enjoining the Boston Police and Fire Departments from laying off policemen and firefighters in a manner that would reduce the percentage of minority officers below the level obtaining at the commencement of layoffs in July 1981. 679 F. 2d 965 (1982). These orders had the effect of partially superseding the operation of the State's statutory last-hired, first-fired scheme for civil service layoffs, Mass. Gen. Laws Ann., ch. 31, § 39 (West 1979). Following the Court of Appeals' decision, Massachusetts enacted legislation providing the city of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force,

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Woll, Michael H. Gottesman, Robert M. Weinberg, George H. Cohen, and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Edward J. Hickey, Jr., Michael S. Wolly,* and *Erick J. Genser* for the International Association of Firefighters, AFL–CIO; by *Robert A. Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Jeffrey P. Sinensky,* and *Meyer Eisenberg* for the Anti-Defamation League of B'nai B'rith; and by *Daniel J. Popeo, Paul D. Kamenar,* and *Nicholas E. Calio* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *J. Clay Smith, Jr.,* and *Herbert O. Reid, Sr.,* for the National Bar Association, Inc., et al.; by *O. Peter Sherwood, Clyde E. Murphy,* and *Barry L. Goldstein* for the City of Detroit; by *Joaquin G. Avila, Morris J. Baller,* and *Carmen A. Estrada* for the League of United Latin American Citizens et al.; by *Robert L. Harris* and *Eva Jefferson Paterson* for the Officers For Justice et al.; by *Judith I. Avner* and *Anne E. Simon* for the National Organization for Women et al.; by *Robert H. Chanin, Richard B. Sobol,* and *Michael B. Trister* for the National Education Association; by *E. Richard Larson, Burt Neuborne,* and *Paulette M. Caldwell* for the National Black Association et al.; and by *Robert Lipshutz, pro se,* for Robert Lipshutz et al.

Briefs of *amici curiae* were filed by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation; by *Jack Greenberg* and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; by *Arthur Kinoy* and *Michael Ratner* for the Affirmative Action Coordinating Center et al.; and by *Walter S. Nussbaum* and *Donald J. Mooney, Jr.,* for the Detroit Police Officers Association.

securing these personnel against future layoffs for fiscal reasons, and requiring the maintenance of minimum staffing levels in the Police and Fire Departments through June 30, 1983. See 1982 Mass. Acts, ch. 190, § 25. In light of these changed circumstances, we vacate the judgment of the Court of Appeals and remand for consideration of mootness in light of 1982 Mass. Acts, ch. 190, § 25.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of these cases.

VERLINDEN B. V. *v.* CENTRAL BANK OF NIGERIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-920. Argued January 11, 1983—Decided May 23, 1983

A contract between the Federal Republic of Nigeria and petitioner Dutch corporation for the purchase of cement by Nigeria provided that Nigeria was to establish a confirmed letter of credit for the purchase price. Subsequently, petitioner sued respondent bank, an instrumentality of Nigeria, in Federal District Court, alleging that certain actions by respondent constituted an anticipatory breach of the letter of credit. Petitioner alleged jurisdiction under the provision of the Foreign Sovereign Immunities Act of 1976 (Act), 28 U. S. C. § 1330(a), granting federal district courts jurisdiction without regard to the amount in controversy of "any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." The District Court, while holding that the Act permitted actions by foreign plaintiffs, dismissed the action on the ground that none of the exceptions to sovereign immunity specified in the Act applied. The Court of Appeals affirmed, but on the ground that the Act exceeded the scope of Art. III of the Constitution, which provides, in part, that the judicial power of the United States shall extend to "all Cases . . . arising under [the] Constitution, the Laws of the United States, and Treaties made . . . under their Authority," and to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." The court held that neither the Diversity Clause nor the "Arising Under" Clause of Art. III is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns.

Held:

1. For the most part, the Act codifies, as a matter of federal law, the restrictive theory of foreign sovereign immunity under which immunity is confined to suits involving the foreign sovereign's public acts and does not extend to cases arising out of its strictly commercial acts. If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a), but if the claim does not fall within one of the exceptions, the court lacks such jurisdiction. Pp. 486–489.

2. On its face, § 1330(a) allows a foreign plaintiff to sue a foreign sovereign in federal court provided the substantive requirements of the Act are satisfied. The Act contains no indication of any limitation based on the plaintiff's citizenship. And, when considered as a whole, the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens. Pp. 489–491.

3. Congress did not exceed the scope of Art. III by granting federal district courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law. While the Diversity Clause of Art. III is not broad enough to support such subject-matter jurisdiction, the "Arising Under" Clause is an appropriate basis for the statutory grant of jurisdiction. In enacting the Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Art. I powers. The Act does not merely concern access to the federal courts but rather governs the types of actions for which foreign sovereigns may be held liable in a federal court and codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law. Thus, a suit against a foreign state under the Act necessarily involves application of a comprehensive body of substantive federal law, and hence "arises under" federal law within the meaning of Art. III. Pp. 491–497.

4. Since the Court of Appeals, in affirming the District Court, did not find it necessary to address the statutory question of whether the present action fell within any specified exception to foreign sovereign immunity, the court on remand must consider whether jurisdiction exists under the Act itself. Pp. 497–498.

647 F. 2d 320, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Abram Chayes argued the cause for petitioner. With him on the briefs were *Berthold H. Hoeniger* and *Mitchell M. Bailey*.

Deputy Solicitor General Bator argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Kenneth S. Geller* and *Stephen M. Shapiro*, Deputy Solicitors General, *William Kanter*, and *Eloise Davies*.

Stephen N. Shulman, by invitation of the Court, 459 U. S. 964, argued the cause as *amicus curiae* in support of the judgment below.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Foreign Sovereign Immunities Act of 1976, by authorizing a foreign plaintiff to sue a foreign state in a United States district court on a nonfederal cause of action, violates Article III of the Constitution.

I

On April 21, 1975, the Federal Republic of Nigeria and petitioner Verlinden B. V., a Dutch corporation with its principal offices in Amsterdam, the Netherlands, entered into a contract providing for the purchase of 240,000 metric tons of cement by Nigeria. The parties agreed that the contract would be governed by the laws of the Netherlands and that disputes would be resolved by arbitration before the International Chamber of Commerce, Paris, France.

The contract provided that the Nigerian Government was to establish an irrevocable, confirmed letter of credit for the total purchase price through Slavenburg's Bank in Amsterdam. According to petitioner's amended complaint, however, respondent Central Bank of Nigeria, an instrumentality of Nigeria, improperly established an unconfirmed letter of credit payable through Morgan Guaranty Trust Co. in New York.[1]

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*Briefs of *amici curiae* urging reversal were filed by *Lori Fisler Damrosch* and *Joseph McLaughlin* for the Committee on International Law of the Association of the Bar of the City of New York; and by *Monroe Leigh, Timothy B. Atkeson, Cecil J. Olmstead*, and *Stewart A. Baker* for the Rule of Law Committee et al.

A brief of *amicus curiae* urging affirmance was filed by *Stephen N. Shulman* and *Mark C. Ellenberg* for the Republic of Guinea.

[1] Morgan Guaranty acted solely as an advising bank; it undertook no independent responsibility for guaranteeing the letter of credit.

In August 1975, Verlinden subcontracted with a Liechtenstein corporation, Interbuco, to purchase the cement needed to fulfill the contract. Meanwhile, the ports of Nigeria had become clogged with hundreds of ships carrying cement, sent by numerous other cement suppliers with whom Nigeria also had entered into contracts.[2] In mid-September, Central Bank unilaterally directed its correspondent banks, including Morgan Guaranty, to adopt a series of amendments to all letters of credit issued in connection with the cement contracts. Central Bank also directly notified the suppliers that payment would be made only for those shipments approved by Central Bank two months before their arrival in Nigerian waters.[3]

Verlinden then sued Central Bank in the United States District Court for the Southern District of New York, alleging that Central Bank's actions constituted an anticipatory breach of the letter of credit. Verlinden alleged jurisdiction under the Foreign Sovereign Immunities Act, 28 U. S. C. § 1330.[4] Respondent moved to dismiss for, among other reasons, lack of subject-matter and personal jurisdiction.

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[2] In 1975, Nigeria entered into 109 cement contracts with 68 suppliers. For a description of the general background of these events, see *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F. 2d 300, 303–306 (CA2 1981), cert. denied, 454 U. S. 1148 (1982). See also *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] Q. B. 529.

[3] The parties do not seriously dispute the fact that these unilateral amendments constituted violations of Article 3 of the Uniform Customs and Practice for Documentary Credits (Int'l Chamber of Commerce Brochure No. 222) (1962 Revision), which, by stipulation of the parties, is applicable. See 488 F. Supp. 1284, 1288, and n. 5 (SDNY 1980).

[4] Title 28 U. S. C. § 1330 provides:

"(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

[Footnote 4 is continued on p. 484]

The District Court first held that a federal court may exercise subject-matter jurisdiction over a suit brought by a foreign corporation against a foreign sovereign. Although the legislative history of the Foreign Sovereign Immunities Act does not clearly reveal whether Congress intended the Act to extend to actions brought by foreign plaintiffs, Judge Weinfeld reasoned that the language of the Act is "broad and embracing. It confers jurisdiction over 'any nonjury civil action' against a foreign state." 488 F. Supp. 1284, 1292 (SDNY 1980). Moreover, in the District Court's view, allowing *all* actions against foreign sovereigns, including those initiated by foreign plaintiffs, to be brought in federal court was necessary to effectuate "the Congressional purpose of concentrating litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertions of sovereign immunity." *Ibid.* The District Court also held that Art. III subject-matter jurisdiction extends to suits by foreign corporations against foreign sovereigns, stating:

> "[The Act] imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that 'arises under' a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity. In short, the Immunities Act injects an essential federal element into all suits brought against foreign states." *Ibid.*

The District Court nevertheless dismissed the complaint, holding that a foreign instrumentality is entitled to sovereign immunity unless one of the exceptions specified in the Act ap-

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"(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."

plies. After carefully considering each of the exceptions upon which petitioner relied, the District Court concluded that none applied, and accordingly dismissed the action.[5]

The Court of Appeals for the Second Circuit affirmed, but on different grounds. 647 F. 2d 320 (1981). The court agreed with the District Court that the Act was properly construed to permit actions brought by foreign plaintiffs. The court held, however, that the Act exceeded the scope of Art. III of the Constitution. In the view of the Court of Appeals, neither the Diversity Clause[6] nor the "Arising Under" Clause[7] of Art. III is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns; accordingly it concluded that Congress was without power to grant federal courts jurisdiction in this case, and affirmed the District Court's dismissal of the action.[8]

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[5] The District Court dismissed "for lack of personal jurisdiction." Under the Act, however, both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject-matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605–1607 . . . or under any applicable international agreement"; § 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction exists under subsection (a) and service of process has been made under 28 U. S. C. § 1608. Thus, if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter jurisdiction and personal jurisdiction. The District Court's conclusion that none of the exceptions to the Act applied therefore signified an absence of both competence and personal jurisdiction.

[6] The Foreign Diversity Clause provides that the judicial power extends "to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U. S. Const., Art. III, § 2, cl. 1.

[7] The so-called "Arising Under" Clause provides: "The judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." *Ibid.*

[8] After the decision was announced, the United States moved for leave to intervene and for rehearing on the ground that the Court of Appeals had not complied with 28 U. S. C. § 2403, which requires that, in "any action"

We granted certiorari, 454 U. S. 1140 (1982), and we reverse and remand.

II

For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country. In *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812), Chief Justice Marshall concluded that, while the jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," *id.*, at 136, the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns. Although the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns. See, *e. g.*, *Berizzi Brothers Co.* v. *S.S. Pesaro*, 271 U. S. 562 (1926); Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Transnat'l L. 33, 39–40 (1978).

As *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities. See, *e. g.*, *Ex parte Peru*, 318 U. S. 578, 586–590 (1943); *Mexico* v. *Hoffman*, 324 U. S. 30, 33–36 (1945).

Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.

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in which "the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General." The Court of Appeals denied the motion without explanation, see App. to Pet. for Cert. 55a.

But in the so-called Tate Letter,[9] the State Department announced its adoption of the "restrictive" theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.

The restrictive theory was not initially enacted into law, however, and its application proved troublesome. As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by "suggestions of immunity" from the State Department. As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.[10]

An additional complication was posed by the fact that foreign nations did not always make requests to the State Department. In such cases, the responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions. See generally Lowenfeld, Claims Against Foreign States—A Proposal for Reform of United States Law, 44 N. Y. U. L. Rev.

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[9] Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984–985 (1952), and in *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U. S. 682, 711 (1976) (Appendix 2 to opinion of WHITE, J.).

[10] See Testimony of Monroe Leigh, Legal Adviser, Department of State, Hearings on H. R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess., 34–35 (1976) (hereafter Hearings on H. R. 11315); Leigh, Sovereign Immunity—The Case of the "Imias," 68 Am. J. Int'l L. 280 (1974); Note, The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court, 46 Ford. L. Rev. 543, 548–549 (1977).

901, 909–912 (1969). Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied. See, *e. g.*, *id.*, at 906–909; Weber, The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect, 3 Yale Studies in World Public Order 1, 11–13, 15–17 (1976).

In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H. R. Rep. No. 94–1487, p. 7 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.

For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity. A foreign state is normally immune from the jurisdiction of federal and state courts, 28 U. S. C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, § 1605(a)(1), and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, § 1605(a)(2).[11] When one of these or the other specified exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," § 1606.[12]

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[11] The Act also contains exceptions for certain actions "in which rights in property taken in violation of international law are in issue," § 1605(a)(3); actions involving rights in real estate and in inherited and gift property located in the United States, § 1605(a)(4); actions for certain noncommercial torts within the United States, § 1605(a)(5); certain actions involving maritime liens, § 1605(b); and certain counterclaims, § 1607.

The Act expressly provides that its standards control in "the courts of the United States and of the States," § 1604, and thus clearly contemplates that such suits may be brought in either federal or state courts. However, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area," H. R. Rep. No. 94–1487, *supra*, at 32, the Act guarantees foreign states the right to remove any civil action from a state court to a federal court, § 1441(d). The Act also provides that any claim permitted under the Act may be brought from the outset in federal court, § 1330(a).[13] If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction.[14] In such a case, the foreign state is also ensured immunity from the jurisdiction of state courts by § 1604.

III

The District Court and the Court of Appeals both held that the Foreign Sovereign Immunities Act purports to allow a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied. We agree.

On its face, the language of the statute is unambiguous. The statute grants jurisdiction over "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity," 28 U. S. C. § 1330(a). The Act contains no indication of any limitation based on the citizenship of the plaintiff.

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[12] Section 1606 somewhat modifies this standard of liability with respect to punitive damages and wrongful-death actions.

[13] "[T]o encourage the bringing of actions against foreign states in Federal courts," H. R. Rep. No. 94–1487, p. 13 (1976), the Act specifies that federal district courts shall have original jurisdiction "without regard to amount in controversy." § 1330(a).

[14] In such a situation, the federal court will also lack personal jurisdiction. See n. 5, *supra*.

The legislative history is less clear in this regard. The House Report recites that the Act would provide jurisdiction for "*any* claim with respect to which the foreign state is not entitled to immunity under sections 1605–1607," H. R. Rep. No. 94–1487, *supra*, at 13 (emphasis added), and also states that its purpose was "to provide when and how *parties* can maintain a lawsuit against a foreign state or its entities," *id.*, at 6 (emphasis added). At another point, however, the Report refers to the growing number of disputes between "American citizens" and foreign states, *id.*, at 6–7, and expresses the desire to ensure "*our citizens* . . . access to the courts," *id.*, at 6 (emphasis added).

Notwithstanding this reference to "our citizens," we conclude that, when considered as a whole, the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens. Congress was aware of concern that "our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." Testimony of Bruno A. Ristau, Hearings on H. R. 11315, at 31. As the language of the statute reveals, Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U. S. C. § 1605.[15] If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff.[16]

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[15] Section 1605(a)(1), which provides that sovereign immunity shall not apply if waived, may be seen as an exception to the normal pattern of the Act, which generally requires some form of contact with the United States. We need not decide whether, by waiving its immunity, a foreign stat could consent to suit based on activities wholly unrelated to the Unite States. The Act does not appear to affect the traditional doctrine o *forum non conveniens*. See generally Kane, Suing Foreign Sovereigns: Procedural Compass, 34 Stanford L. Rev. 385, 411–412 (1982); Note, Suits b

IV

We now turn to the core question presented by this case: whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law.

This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution. See, *e. g.*, *Hodgson* v. *Bowerbank*, 5 Cranch 303 (1809); *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234 (1922). Within Art. III of the Constitution, we find two sources authorizing the grant of jurisdiction in the Foreign Sovereign Immunities Act: the Diversity Clause and the "Arising Under" Clause.[17] The Diversity Clause, which provides that the judicial power extends to controversies between "a State, or the Citizens thereof, and foreign States," covers actions by citizens of

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Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction, 90 Yale L. J. 1861, 1871–1873 (1981).

[16] Prior to passage of the Foreign Sovereign Immunities Act, which Congress clearly intended to govern all actions against foreign sovereigns, state courts on occasion had exercised jurisdiction over suits between foreign plaintiffs and foreign sovereigns, see, *e. g.*, *J. Zeevi & Sons* v. *Grindlays Bank*, 37 N. Y. 2d 220, 333 N. E. 2d 168, cert. denied, 423 U. S. 866 (1975). Congress did not prohibit such actions when it enacted the Foreign Sovereign Immunities Act, but sought to ensure that any action that might be brought against a foreign sovereign in state court could also be brought in or removed to federal court. See *supra*, at 489.

[17] In view of our conclusion that proper actions by foreign plaintiffs under the Foreign Sovereign Immunities Act are within Art. III "arising under" jurisdiction, we need not consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called "protective jurisdiction." See generally Note, The Theory of Protective Jurisdiction, 57 N. Y. U. L. Rev. 933 (1982).

States. Yet diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs, since a foreign plaintiff is not "a State, or [a] Citize[n] thereof." See *Mossman* v. *Higginson*, 4 Dall. 12 (1800).[16] We conclude, however, that the "Arising Under" Clause of Art. III provides an appropriate basis for the statutory grant of subject-matter jurisdiction to actions by foreign plaintiffs under the Act.

The controlling decision on the scope of Art. III "arising under" jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824). In *Osborn*, the Court upheld the constitutionality of a statute that granted the Bank of the United States the right to sue in federal court on causes of action based upon state law. There, the Court concluded that the "judicial department may receive . . . the power of construing every . . . law" that "the Legislature may constitutionally make." *id.*, at 818. The rule was laid down that

> "it [is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction." *Id.*, at 822.

Osborn thus reflects a broad conception of "arising under" jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law. The breadth of that conclusion has been questioned. It has been observed that, taken at its broadest, *Osborn* might be read as permitting "assertion of original federal jurisdiction on the remote possibility of presentation of a federal question." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 482 (1957) (Frankfurter, J., dissenting). See, *e. g.*, P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 866–867 (2d ed. 1973). We need not now resolve that issue or decide the precise boundaries of Art. III jurisdiction, however, since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding. Rather, a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly "arises under" federal law, as that term is used in Art. III.

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[16] Since Art. III requires only "minimal diversity," see *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530 (1967), diversity jurisdiction would be a sufficient basis for jurisdiction where at least one of the plaintiffs is a citizen of a State.

By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident. See, *e. g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 423–425 (1964); *Zschernig* v. *Miller*, 389 U. S. 429, 440–441 (1968).

To promote these federal interests, Congress exercised its Art. I powers[19] by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States. The statute must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U. S. C. § 1330(a).[20] At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction.

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[19] In enacting the legislation, Congress relied specifically on its powers to prescribe the jurisdiction of federal courts, Art. I, § 8, cl. 9; to define offenses against the "Law of Nations," Art. I, § 8, cl. 10; to regulate commerce with foreign nations, Art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government's powers, Art. I, § 8, cl. 18.

[20] The House Report on the Act states that "sovereign immunity is an affirmative defense which must be specially pleaded," H. R. Rep. No. 94-1487, p. 17 (1976). Under the Act, however, subject-matter jurisdic-

In reaching a contrary conclusion, the Court of Appeals relied heavily upon decisions construing 28 U. S. C. § 1331, the statute which grants district courts general federal-question jurisdiction over any case that "arises under" the laws of the United States. The court placed particular emphasis on the so-called "well-pleaded complaint" rule, which provides, for purposes of *statutory* "arising under" jurisdiction, that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense. See, *e. g.*, *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908); *Gully* v. *First National Bank*, 299 U. S. 109 (1936); 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3562 (1975) (hereinafter Wright, Miller, & Cooper). In the view of the Court of Appeals, the question of foreign sovereign immunity in this case arose solely as a defense, and not on the face of Verlinden's well-pleaded complaint.

Although the language of § 1331 parallels that of the "Arising Under" Clause of Art. III, this Court never has held that statutory "arising under" jurisdiction is identical to Art. III "arising under" jurisdiction. Quite the contrary is true. Section 1331, the general federal-question statute, although broadly phrased,

> "has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy

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tion turns on the existence of an exception to foreign sovereign immunity, 28 U. S. C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act.

> which have emerged from the [statute's] function as a provision in the mosaic of federal judiciary legislation. *It is a statute, not a Constitution, we are expounding.*" *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 379 (1959) (emphasis added).

In an accompanying footnote, the Court further observed: "Of course the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." *Id.*, at 379, n. 51. We reiterated that conclusion in *Powell* v. *McCormack*, 395 U. S. 486, 515 (1969). See also *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 506 (1900). As these decisions make clear, Art. III "arising under" jurisdiction is broader than federal-question jurisdiction under § 1331, and the Court of Appeals' heavy reliance on decisions construing that statute was misplaced.[21]

In rejecting "arising under" jurisdiction, the Court of Appeals also noted that 28 U. S. C. § 1330 is a jurisdictional provision.[22] Because of this, the court felt its conclusion compelled by prior cases in which this Court has rejected congressional attempts to confer jurisdiction on federal courts simply by enacting jurisdictional statutes. In *Mossman* v. *Higginson*, 4 Dall. 12 (1800), for example, this Court found that a statute purporting to confer jurisdiction over actions "where an alien is a party" would exceed the scope of Art. III if construed to allow an action solely between two aliens. And in *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 451–453 (1852), the Court, while upholding a statute granting jurisdiction over vessels on the Great Lakes as an exercise of maritime jurisdiction, rejected the view that the jurisdictional statute itself constituted a federal regulation of commerce upon which "arising under" jurisdiction could be based.

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[21] Citing only *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505 (1900), the Court of Appeals recognized that this Court "has implied" that Art. III jurisdiction is broader than that under § 1331. The court nevertheless placed substantial reliance on decisions construing § 1331.

[22] Although a major function of the Foreign Service Immunities Act as a whole is to regulate jurisdiction of federal courts over cases involving foreign states, the Act's purpose is to set forth "comprehensive rules governing sovereign immunity." H. R. Rep. No. 94–1487, *supra*, at 12. The Act also prescribes procedures for commencing lawsuits against foreign states in federal and state courts and specifies the circumstances under which attachment and execution may be obtained against the property of foreign states. *Ibid.* In addition, the Act defines "Extent of Liability," setting out a general rule that the foreign sovereign is "liable in the same manner and to the same extent as a private individual," subject to certain specified exceptions, 28 U. S. C. § 1606. In view of our resolution of this case, we need not consider petitioner's claim that § 1606 itself renders every claim against a foreign sovereign a federal cause of action. See generally 13 Wright, Miller, & Cooper § 3563, at 418–419.

From these cases, the Court of Appeals apparently concluded that a jurisdictional statute can never constitute the federal law under which the action arises, for Art. III purposes. Yet the statutes at issue in these prior cases sought to do nothing more than grant jurisdiction over a particular class of cases. As the Court stated in *The Propeller Genesee Chief*: "The law . . . contains no regulations of commerce . . . . *It merely confers a new jurisdiction on the district courts; and this is its only object and purpose*. . . . It is evident . . . that Congress, in passing [the law], did not intend to exercise their power to regulate commerce . . . ." 12 How., at 451–452 (emphasis added).

In contrast, in enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Art. I powers. See n. 19, *supra*. As the House Report clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity," H. R. Rep. No. 94-1487, p. 12 (1976); the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, see *Ex parte Peru*, 318 U. S., at 588; *Mexico* v. *Hoffman*, 324 U. S., at 36; and applying those standards will generally require interpretation of numerous points of federal law. Finally, if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States—manifestly, "the title or right set up by the party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction." *Osborn* v. *Bank of United States*, 9 Wheat., at 822. That the inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction does not affect the constitutionality of Congress' action in granting federal courts jurisdiction over cases calling for application of this comprehensive regulatory statute.

Congress, pursuant to its unquestioned Art. I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States. The resulting jurisdictional grant is within the bounds of Art. III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Art. III.

V

A conclusion that the grant of jurisdiction in the Foreign Sovereign Immunities Act is consistent with the Constitution does not end the case. An action must not only satisfy Art. III but must also be supported by a statutory grant of subject-matter jurisdiction. As we have made clear, deciding whether statutory subject-matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies.

In the present case, the District Court, after satisfying itself as to the constitutionality of the Act, held that the present action does not fall within any specified exception. The Court of Appeals, reaching a contrary conclusion as to jurisdiction under the Constitution, did not find it necessary to address this statutory question.[23] Accordingly, on remand the Court of Appeals must consider whether jurisdiction exists under the Act itself. If the Court of Appeals agrees with the District Court on that issue, the case will be at an end. If, on the other hand, the Court of Appeals concludes that jurisdiction does exist under the statute, the action may then be remanded to the District Court for further proceedings.

It is so ordered.

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[23] In several related cases involving contracts between Nigeria and other cement suppliers, the Court of Appeals held that statutory subject-matter jurisdiction existed under the Act. In those cases, the court held that Nigeria's acts were commercial in nature and "cause[d] a direct effect in the United States," within the meaning of 28 U. S. C. § 1605(a). *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F. 2d, at 310–313. Each of those actions involved a contract with an *American* supplier operating *within the United States*, however. In the present case, the District Court found that exception inapplicable, concluding that the repudiation of the letter of credit "caused no direct, substantial, injurious effect in the United States." 488 F. Supp., at 1299–1300.

UNITED STATES *v.* HASTING ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81-1463. Argued December 7, 1982—Decided May 23, 1983

At respondents' trial in Federal District Court on charges of kidnaping, transporting women across state lines for immoral purposes, and conspiracy to commit such offenses, the victims' testimony included recitals concerning multiple incidents of rape and sodomy by respondents. The defense relied on a theory of consent and—inconsistently—on the possibility that the victims' identification of respondents was mistaken. None of the respondents testified. During the prosecutor's summation to the jury, defense counsel objected when the prosecutor began to comment on the defense evidence, particularly that respondents never challenged the kidnaping, the interstate transportation of the victims, and the sexual acts. A motion for a mistrial was denied, and the jury returned a guilty verdict as to each respondent on all counts. The Court of Appeals reversed the convictions and remanded for retrial, concluding that the summation violated respondents' Fifth Amendment rights under *Griffin* v. *California*, 380 U. S. 609. The court declined to rely on the harmless-error doctrine, stating that application of the doctrine "would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights."

Held:

1. The Court of Appeals erred in reversing the convictions apparently on the basis that it had the supervisory power to discipline prosecutors for continuing violations of *Griffin*, *supra*, regardless of whether the prosecutor's arguments constituted harmless error. Pp. 504–509.

(a) The goals that are implicated by supervisory powers—implementing a remedy for violation of recognized rights, preserving judicial integrity by ensuring that a conviction rests on appropriate considerations before the jury, and deterring illegal conduct—are not significant in the context of this case if the errors alleged are harmless. Reversals of convictions under a court's supervisory power must be approached with some caution and with a view toward balancing the interests involved. Pp. 505–507.

(b) *Chapman* v. *California*, 386 U. S. 18, held that a *Griffin* error is not *per se* error requiring automatic reversal and that a conviction should be affirmed if the reviewing court concludes that, on the whole record, the error was harmless beyond a reasonable doubt. It is the reviewing court's duty to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. Here, the Court of Appeals' analysis, in making passing reference to the harmless-error doctrine but not applying it, failed to strike the balance between disciplining the prosecutor on the one hand and the interest in the prompt administration of justice and the victims' interests in not being subjected to the burdens of another trial on the other. Pp. 507–509.

2. On the whole record, the error identified by the Court of Appeals was harmless beyond a reasonable doubt. This Court has the authority to review records to evaluate a harmless-error claim, and the pertinent question here is whether, absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the victims' testimony, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict. The victims' testimony negated any doubt as to identification, and neutral witnesses corroborated critical aspects of the victims' testimony, thus establishing a compelling case of guilt. On the other hand, the scanty evidence tendered by respondents related to their claims of mistaken identity and consent. The patent inconsistency of these defense theories could hardly have escaped the jurors' attention. Pp. 510–512.

660 F. 2d 301, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a separate statement, *post*, p. 512. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 512. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 519.

John Fichter De Pue argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *Harriet S. Shapiro*.

Paul Victor Esposito, argued the cause for respondents. With him on the brief were *Robert C. Babione* and *William L. Gagen*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the reversal of respondents' convictions because of prosecutorial allusion to their failure to rebut the Government's evidence.

I

On October 11, 1979, in the vicinity of East St. Louis, Ill., three young women and a man, Randy Newcomb, were riding in an automobile when a turquoise Cadillac forced them off the road. The occupants of the Cadillac, later identified as Napoleon Stewart, Gregory Williams, Gable Gibson, Kevin Anderson, and Kelvin Hasting, respondents here, forcibly removed the women from the car in which they were riding with Newcomb; in Newcomb's presence, Stewart and Gibson immediately raped one of them and forced her to perform acts of sodomy. Newcomb was left behind while the three women were then taken in the Cadillac to a vacant garage in St. Louis, Mo.; there they were raped and forced to perform deviant sexual acts. Two of the women were then taken to Stewart's home where Stewart and Williams took turns raping and sodomizing them. The third victim was taken in a separate car to another garage where the other respondents repeatedly raped her and compelled her to perform acts of sodomy.

About 6 a. m., the three women were released and they immediately contacted the St. Louis police; they furnished descriptions of the five men, the turquoise Cadillac, and the locations of the sexual attacks. From these descriptions, the police immediately identified one of the places to which the women were taken—the home of respondent Napoleon Stewart. With the consent of Stewart's mother, police entered the home, arrested Stewart, and found various items of the victims' clothing and personal effects. The turquoise Cadillac was located, seized, and found to be registered to Williams. On the basis of the information gathered, the police arrested Williams, Gibson, Anderson, and Hasting, all of whom were later identified by the victims during police lineups.

Respondents were charged with kidnaping in violation of 18 U. S. C. § 1201(a)(1), transporting a woman across state lines for immoral purposes in violation of the Mann Act, 18

U. S. C. §2421, and conspiracy to commit the foregoing offenses in violation of 18 U. S. C. §371. They were tried before a jury. The defense relied on a theory of consent and—inconsistently—on the possibility that the victims' identification of the respondents was mistaken. None of the respondents testified.

At the close of the case, and during the summation of the prosecutor, the following interchange took place:

> "[PROSECUTOR]: . . . Let's look at the evidence the defendant[s] put on here for you so that we can put that in perspective. I'm going to tell you what the defendant[s] did not do. Defendants on cross-examination and—
>
> "[DEFENSE COUNSEL]: I'll object to that, Your Honor. You're going to instruct to the contrary on that and the defendants don't have to put on any evidence.
>
> "[PROSECUTOR]: That's correct, Your Honor.
>
> "THE COURT: That's right, they don't. They don't have to.
>
> "[PROSECUTOR]: But if they do put on a case, the Government can comment on it. The defendants at no time ever challenged any of the rapes, whether or not that occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that. And you can use your common sense and still see what that tells you. . . ." Tr. 873–874.

A motion for a mistrial was denied. The jury returned a verdict of guilty as to each respondent on all counts.

On appeal, various errors were alleged, including a claim that the prosecutor violated respondents' Fifth Amendment rights under *Griffin* v. *California*, 380 U. S. 609 (1965).[1] In a terse opinion, the Court of Appeals reversed the convictions and remanded for retrial, 660 F. 2d 301 (CA7 1980), citing its decision in *United States* v. *Buege*, 578 F. 2d 187, 188, cert. denied, 439 U. S. 871 (1978), for the proposition that *Griffin* error occurs even without a direct statement on the failure of a defendant to take the stand when the "prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony." The Court of Appeals declined to rely on the harmless-error doctrine, however, stating that application of that doctrine "would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights." 660 F. 2d, at 303. Respondents' remaining claims were disposed of in an unpublished order that simply stated that the judgment of the District Court was reversed and the case remanded for a new trial.[2]

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[1] Respondents also argued that the prosecution's comments violate 18 U. S. C. § 3481, which is discussed in *Griffin* v. *California*, 380 U. S., at 612. Section 3481 provides:

"In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This statute is the current codification of the Act of March 16, 1878, 20 Stat. 30, ch. 37, which was construed in *Wilson* v. *United States*, 149 U. S. 60 (1893). There the Court held that a new trial must be granted when the jury hears "comment, especially hostile comment, upon [the] failure [to testify]," *id.*, at 65, in order to effectuate the congressional policy underlying the statute. See also *Bruno* v. *United States*, 308 U. S. 287 (1939).

[2] The court's opinion and order failed to describe or decide respondents' remaining contentions. Nor were these claims presented in the parties' briefs to this Court.

The Government petitioned for rehearing, claiming that the prosecutor's remark was equivocal, nonprejudicial, and that the court failed to apply *Chapman* v. *California*, 386 U. S. 18 (1967), a case that the Court of Appeals had, in fact, failed to cite.[3] The petition for rehearing was denied. We granted certiorari, 456 U. S. 971 (1982). We reverse.

II

The opinion of the Court of Appeals does not make entirely clear its basis for reversing the convictions in this gruesome case. Its cursory treatment of the harmless-error question and its focus on the failure generally of prosecutors within its jurisdiction to heed the court's prior admonitions about commenting on a defendant's failure to rebut the prosecution's case suggest that, notwithstanding the harmless nature of the error, the court acted in this case to discipline the prosecutor—and warn other prosecutors—for what it perceived to be continuing violations of *Griffin* and § 3481. The court pointedly emphasized its own decision in *United States* v. *Rodriguez*, 627 F. 2d 110 (1980), where it characterized the problem of prosecutorial comments on a defendant's silence as one which "continues to arise with disturbing frequency throughout this circuit despite the admonition of trial judges and this court," *id.*, at 112.

In *Rodriguez*, the court described its efforts to cure the problem by ordering circulation to all United States Attorneys of an unpublished order calling attention to the subject. In addition, the *Rodriguez* court discussed, without explicitly adopting, the rule announced by the First Circuit in *United States* v. *Flannery*, 451 F. 2d 880, 882 (1971), that any prosecutorial reference to a defendant's failure to testify is *per se* grounds for reversal unless the judge immediately instructs the jury that the defendant had a constitutional right not to testify and advises the jury that the prosecutor's conduct was improper. Obviously the Court of Appeals is more familiar than we are with what appellate records show concerning prosecutorial indifference to the court's admonitions; the question we address is whether reversal of these convictions was an appropriate response. In view of this history of tension between what the Court of Appeals perceives as the requirements of *Griffin* and § 3481 and that court's view of the prosecutors' conduct, we proceed on the assumption that, without so stating, the court was exercising its supervisory powers to discipline the prosecutors of its jurisdiction. The question presented is whether, on this record, in a purported exercise of supervisory powers, a reviewing court may ignore the harmless-error analysis of *Chapman*. We hold that the harmless-error rule of *Chapman*, which we discuss in Part II–B, *infra*, may not be avoided by an assertion of supervisory power, simply to justify a reversal of these criminal convictions.

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[3] Arguably, the Court of Appeals also ignored 28 U. S. C. § 2111, which provides that "[o]n the hearing of any appeal . . . , the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

A

Supervisory Power

"[G]uided by considerations of justice," *McNabb* v. *United States*, 318 U. S. 332, 341 (1943), and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights, *McNabb*, *supra*, at 340; *Rea* v. *United States*, 350 U. S. 214, 217 (1956); to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, *McNabb*, *supra*, at 345; *Elkins* v. *United States*, 364 U. S. 206, 222 (1960); and finally, as a remedy designed to deter illegal conduct, *United States* v. *Payner*, 447 U. S. 727, 735–736, n. 8 (1980).

The goals that are implicated by supervisory powers are not, however, significant in the context of this case if, as the Court of Appeals plainly implied, the errors alleged are harmless. Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error. Further, in this context, the integrity of the process carries less weight, for it is the essence of the harmless-error doctrine that a judgment may stand only when there is no "reasonable possibility that the [practice] complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87 (1963). Finally, deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of *Griffin*[4] and where means more narrowly tailored to deter objectionable prosecutorial conduct are available.[5]

To the extent that the values protected by supervisory authority are at issue here, these powers may not be exercised in a vacuum. Rather, reversals of convictions under the court's supervisory power must be approached "with some caution," *Payner*, 447 U. S., at 734, and with a view toward balancing the interests involved, *id.*, at 735–736, and n. 8; *Elkins, supra*, at 216; *United States* v. *Caceres*, 440 U. S. 741, 755 (1979); cf. *Nardone* v. *United States*, 308 U. S. 338, 340 (1939). As we shall see below, the Court of Appeals failed in this case to give appropriate—if, indeed, any—weight to these relevant interests. It did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events. See *Morris* v. *Slappy, ante*, at 14–15. The conclusion is inescapable that the Court of Appeals focused exclusively on its concern that the prosecutors within its jurisdiction were indifferent to the frequent admonitions of the court. The court appears to have decided to deter future similar comments by the drastic step of reversal of these convictions. But the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.

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[4] JUSTICE STEVENS may well be correct that the prosecutor's argument was permissible comment. The question on which review was granted assumed that there was error and the question to be resolved was whether harmless-error analysis should have applied. Pet. for Cert. (I).

[5] Here, for example, the court could have dealt with the offending argument by directing the District Court to order the prosecutor to show cause why he should not be disciplined, see, *e. g.*, Southern District of Illinois Rule 33, or by asking the Department of Justice to initiate a disciplinary proceeding against him, see, *e. g.*, 28 CFR § 0.39 *et seq.* (1982). The Government informs us that during the year 1980, the Department of Justice's Office of Professional Responsibility investigated 28 complaints of unethical conduct and that one Assistant United States Attorney resigned in the face of an investigation that he made improper arguments to a grand jury. Brief for United States 21, n. 16. The Court also could have publicly chastised the prosecutor by identifying him in its opinion. See also *United States* v. *Modica*, 663 F. 2d 1173, 1183–1186 (CA2 1981).

B

Harmless Error

Since the Court of Appeals focused its attention on *Griffin* rather than *Chapman*, an appropriate starting point is to recall the sequence of these two cases. *Griffin* was decided first. In that case, a California prosecutor, in accordance with a provision of the California Constitution, commented to the jury on a defendant's failure to provide evidence on matters that only he could have been expected to deny or explain. In reliance on *Wilson* v. *United States*, 149 U. S. 60 (1893), the *Griffin* Court interpreted the Fifth Amendment guarantee against self-incrimination to mean that comment on the failure to testify was an unconstitutional burden on the basic right. Accordingly, the Court held that the constitutional provision permitting prosecutorial comment on the failure of the accused to testify violated the Fifth Amendment.

Soon after *Griffin*, however, this Court decided *Chapman* v. *California*, which involved prosecutorial comment on the defendant's failure to testify in a trial that had been conducted in California before *Griffin* was decided. The question was whether a *Griffin* error was *per se* error requiring automatic reversal or whether the conviction could be affirmed if the reviewing court concluded that, on the whole record, the error was harmless beyond a reasonable doubt. In *Chapman* this Court affirmatively rejected a *per se* rule.

After examining the harmless-error rules of the 50 States along with the federal analog, 28 U. S. C. § 2111, the *Chapman* Court stated:

> "All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. *We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless*, not requiring the automatic reversal of the conviction." 386 U. S., at 22 (emphasis added).

In holding that the harmless-error rule governs even constitutional violations under some circumstances,[6] the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. *Brown* v. *United States*, 411 U. S. 223, 231–232 (1973), citing *Bruton* v. *United States*, 391 U. S. 123, 135 (1968); cf. *Engle* v. *Isaac*, 456 U. S. 107, 133–134 (1982). *Chapman* reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead 'impregnable citadels of technicality.'" R. Traynor, The Riddle of Harmless Error 14 (1970) (quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A. B. A. J. 217, 222 (1925)).

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[6] The Court acknowledged that certain errors may involve "rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U. S., at 23, citing *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (impartial judge).

Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, *e. g.*, *Brown*, *supra*, at 230–232; *Harrington* v. *California*, 395 U. S. 250 (1969); *Milton* v. *Wainwright*, 407 U. S. 371 (1972). The goal, as Chief Justice Traynor has noted, is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error." Traynor, *supra*, at 81.

Here, the Court of Appeals, while making passing reference to the harmless-error doctrine, did not apply it. Its analysis failed to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other.[7]

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[7] Since we hold that *Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless, we do not reach the question whether 28 U. S. C. § 2111, see n. 3, *supra*, requires the same result. Its predecessor, 28 U. S. C. § 391 (1946 ed.), enacted in 1919, 40 Stat. 1181, provided that judgment was to be affirmed "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Under its plain meaning, this statute would not have reached a constitutional violation, see

III

We turn, then, to the question whether, on the whole record before us, the error identified by the Court of Appeals was harmless beyond a reasonable doubt. Although we are not required to review records to evaluate a harmless-error claim, and do so sparingly, we plainly have the authority to do so.[8] See *Harrington, supra,* where the Court granted certiorari to consider the issue whether a *Bruton* error was harmless and to that end undertook its "own reading of the record," 395 U. S., at 254. See also *Chapman*, 386 U. S., at 24–26; *Milton* v. *Wainwright, supra,* at 377; *Parker* v. *Randolph*, 442 U. S. 62, 80–81 (1979) (opinion of BLACKMUN, J.). Cf. *Brown, supra,* at 231. In making this assessment, we are aided by the Court of Appeals' own explicit statement that

> "[d]espite the magnitude of *the crimes committed* and *the clear evidence of guilt*, an application of the doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights." 660 F. 2d, at 303. (Emphasis added.)

The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer

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Bruno v. *United States*, 308 U. S., at 294; *Kotteakos* v. *United States*, 328 U. S. 750, 764–765 (1946).

The original statute was, however, repealed in 1948 and replaced a year later by a version in which the term "technical" was deleted, 63 Stat. 105. Although it appears that repeal and reenactment resulted from confusion over whether Federal Rule of Criminal Procedure 52(a) and Federal Rule of Civil Procedure 61 made § 391 redundant, 11 C. Wright & A. Miller, Federal Practice and Procedure § 2881 (1973), the result is that § 2111 by its terms may be coextensive with *Chapman*, see R. Traynor, The Riddle of Harmless Error 41–43 (1970).

We need not reach this issue, or the further question whether there is a conflict between § 3481, see n. 1, *supra*, and § 2111, which appears to require affirmance of a conviction if the error is harmless.

[8] Since this Court has before it the same record the Court of Appeals reviewed, we are in precisely the position of that court in addressing the issue of harmless error.

evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty? *Harrington, supra,* at 254. A reviewing court must begin with the reality that the jurors sat in the same room day after day with the defendants and their lawyers; much testimony had been heard from the three women who described in detail the repeated wanton acts of the defendants during three hours in two States, thus negating any doubt as to identification. Immediately on their release the victims described the defendants to the police and promptly identified them in lineups. Neutral witnesses corroborated critical aspects of the victims' testimony. Randy Newcomb, a prosecution witness, testified that he witnessed the rape of one of the women shortly after the car in which he was riding was stopped; the garage owner where the second episode occurred observed two women with four men, one of whom answered to respondent Anderson's description. The automobile, which was central to the case, was a singular color and was registered to respondent Williams. Property of two of the victims was found in respondent Stewart's possession hours after the crimes; Williams' fingerprints were found on the car in which the victims had been riding. In short, a more compelling case of guilt is difficult to imagine.

Paradoxically, respondents relied for their defense on a claim of mistaken identity, yet they tendered no evidence placing any of them at other places at the relevant times. The evidence presented by them was testimony showing (a) that some of respondents' hairstyles immediately before and after the incident differed from the victims' descriptions of their assailants' appearances, (b) that *two* of the victims had been unable to pick *one* of the respondents, Anderson, out of lineup, (c) that it was so dark at the time of the attacks and uring the car trips, that Newcomb did not have an unobtructed view of the rape he described, and (d) that Stewart's mother testified that the girls she saw with her son did not ook "scared." Finally, the defense intimated that the vic- ms crossed state lines voluntarily by raising the possibility that the women entered respondents' car willingly—a point hardly consistent with the idea that the respondents did not commit the crimes charged. That these defense efforts presented patently and totally inconsistent theories could hardly have escaped the attention of the jurors.

In the face of this overwhelming evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants, it is little wonder that the Court of Appeals referred to "the crimes committed" and acknowledged the "clear evidence of guilt." Of course, none of these hard realities would ever constitute justification for prosecutorial misconduct, but here, accepting the utterance of the prosecutor as improper, criticism of him could well be directed more accurately at his competence and judgment in jeopardizing an unanswered—and unanswerable—case. On the whole record, we are satisfied beyond a reasonable doubt that the error relied upon was harmless.

The judgment of the Court of Appeals, ordering a new trial based on the prosecutor's argument, is reversed. Because other contentions were advanced by respondents that were not treated in the court's opinion, we remand to allow the Court of Appeals to consider such other claims if respondents elect to press them.

Reversed and remanded.

JUSTICE BLACKMUN would vacate the judgment of the Court of Appeals and remand the case for consideration by that court of the issue whether the Fifth Amendment violation it perceived to exist was harmless error within the measure of *Chapman* v. *California*, 386 U. S. 18 (1967).

JUSTICE STEVENS, concurring in the judgment.

In my opinion the prosecutor's closing argument was free of constitutional error. It is therefore unnecessary for this Court to consider the scope of the supervisory power of the federal appellate courts,[1] and it is unjustifiable for the Court to decree that, upon examination of the record in this case, the error was harmless beyond a reasonable doubt.

Although the Government does not expressly challenge the Court of Appeals' conclusion that the prosecutor's comments were unconstitutional, both its petition and its brief on the merits question the correctness of that conclusion.[2] Without conceding that the issue is properly before this Court, respondents devote several pages of their brief to the Fifth Amendment issue.[3] That issue was raised and decided below and is clearly presented in the record. Further, both parties agree that, in determining whether the error was harmless, it is necessary to consider the content of the prosecutor's alleged comment on the defendants' silence and the likelihood that it affected the deliberations of the jury. Under these circumstances, whether or not the constitutionality of the prosecutor's remarks is "fairly subsumed" in the question presented in the petition, I believe it proper for this Court to recognize that the Court of Appeals decided this question erroneously, and to reverse the judgment on that ground without considering the supervisory power or the harmless-error doctrine.[4]

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[1] The Court of Appeals' opinion, as JUSTICE BRENNAN's partial concurrence observes, does not expressly refer to the supervisory power, nor does it explain any of the factors that might have justified its exercise of that power. Under these circumstances, I agree with JUSTICE BRENNAN that it is improper for this Court to reach out to enunciate general principles about the limits on the supervisory power of the federal courts.

[2] See Pet. for Cert. 12, n. 10; Brief for United States 22–24, and n. 19.

[3] Brief for Respondents 37–40.

[4] See this Court's Rule 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court"); Rule 34.1(a) ("At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide"). When this Court reviews a decision by a lower federal court, the scope of the questions presented does not create any jurisdictional limitation on our consideration of the case. R. Robert-

In this case the five defendants presented 16 witnesses, who raised questions about some portions of the Government's case but failed to deny or to contradict other portions. In reviewing the evidence adduced at the 5-day trial, the prosecutor identified the weaknesses in the defendants' presentations and invited inferences from the main focus of the evidence presented by the five defendants. I believe that the prosecutor's closing argument did not constitute improper comment on the defendants' failure to testify.

The four young people involved in this case arrived at Millas' Steak House at about midnight on October 11, 1979, in a car driven by one of the young women, who had apparently borrowed the car from her boyfriend. The driver and another of the young women went into the bar-restaurant and stayed two or three hours, drinking Pina Coladas and dancing, while the third young woman sat in the back seat of the car drinking beer with the young man. When they left Millas' at approximately 3 a. m., the other young woman decided to drive. The car needed oil. Instead of turning right in the direction of their homes, along a highway that would bring them to at least one all-night gas station, they turned left. This route led them to a Clark station and then to the spot where they were forced off the road. Defense counsel emphasized these facts in an attempt to cast doubts on the victims' ability to identify all of the defendants accurately, and to suggest the implausibility of their accounts.[5] The

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son & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 418 (R. Wolfson & P. Kurland ed. 1951). Although we usually decline to address issues not expressly presented by the petition, we occasionally depart from this rule of practice. See, *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555, 559–560, n. 6 (1978); *Washington* v. *Davis*, 426 U. S. 229, 238, and nn. 8, 9 (1976); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320–321, n. 6 (1971).

[5] See, *e. g.*, Tr. 169–174, 192–193, 204–213, 249–257 (cross-examination of first young woman); 335–338, 342–344, 351–363, 369–374 (cross-examination of second young woman); 431–441, 448, 454, 462–465, 468–472, 497–502 (cross-examination of third young woman); 528–531, 536–540, 553–556, 562–564 (cross-examination of the young man); 884–885, 891–892, 902,

prosecutor argued, quite properly in my opinion, that the defense had tried to divert the jury's attention from the central question in the case—what happened after the car was forced off the road by defendants' Cadillac. That central question could have been addressed by defense witnesses and defense counsel even without testimony by the defendants themselves.[6]

As I have written before, a defendant's election not to testify "is almost certain to prejudice the defense no matter what else happens in the courtroom." *United States* v. *Davis*, 437 F. 2d 928, 933 (CA7 1971). Under *Griffin* v. *California*, 380 U. S. 609 (1965), it is improper for either the court or the prosecutor to ask the jury to draw an adverse inference from a defendant's silence. But I do not believe the protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case. The comment in this record, *ante*, at 502, is not remotely comparable to the error in either *Griffin*[7] or *Wilson* v.

933–935 (closing arguments). The defense counsel also attempted to undermine the Government's case by pointing to vagueness and inconsistency in the witnesses' accounts of the episode and their descriptions of the suspects.

[6] Reference to uncontradicted portions of the Government's evidence is improper only when the statement will naturally and necessarily be construed by the jury to be an allusion to the defendant's failure to testify.

[7] "'He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"'These things he has not seen fit to take the stand and deny or explain.

"'And in the whole world, if anybody would know, this defendant would know.

"'Essie Mae is dead, she can't tell you her side of the story. The defendant won't.'" 380 U. S., at 611.

United States, 149 U. S. 60 (1893).[8] In my opinion it did not violate either the Fifth Amendment or 18 U. S. C. § 3481 as construed in *Wilson*.

If I were persuaded that the prosecutor's comment was improper, I could not possibly join the Court's *sua sponte* harmless-error determination. In reviewing a federal criminal conviction, a federal appellate court should apply a stringent harmless-error test—more stringent than the test that is constitutionally permissible in state-court proceedings under *Chapman* v. *California*, 386 U. S. 18 (1967). A federal appellate court should not find harmless error merely because it believes that the other evidence is "overwhelming." As we wrote in *Kotteakos* v. *United States*, 328 U. S. 750, 763–764 (1946):

> "[I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . . [T]he question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. In this case the parties did not provide us with a printed appendix containing any portion of the trial testimony or with any of the trial exhibits that are discussed at some length in the transcript. I have spent several hours reviewing the one copy of the trial transcript that has been filed with the Court. But I have not read all of its 1,013 pages, and I have read only a few of the 450 pages of the transcript of the suppression hearing. The task of organizing and digesting the testimony is a formidable one. The victims' testimony refers to the perpetrators by various descriptions—"the one with the goatee," "the tall one," "the skinnier one," "the heavier set one," "the bigger one," "a stocky, heavy set guy," "the fat one," "the short, thinner one," "the one in the big hat," "the guy with the hair out," "the guy with the fro," the "shorter one with short hair," the "skinnier one with the shorter hair," "a younger guy," "the guy with the smudged up nose," "the smashed nose," and "the ones that was in the back"—rather than by name. As a practical matter, it is impossible for any Member of this Court to make the kind of conscientious and detailed examination of the record that should precede a determination that there can be no reasonable doubt that the jury's deliberations as to each defendant were not affected by the alleged error. And it is an insult to the Court of Appeals to imply, as the Court does today, that it cannot be trusted with a task that would normally be conducted on remand. *Ante*, at 510.

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[8] "When the District Attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, 'I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled . . . ." 149 U. S., at 66.

I have read enough to persuade me that there is a high probability that each of the defendants was correctly identified as a participant in the events of October 11, 1979. But I could not possibly state with anything approaching certainty that the 12 jurors who spent three hours deliberating the fate of these five defendants would not have entertained a reasonable doubt concerning at least one of the guilty verdicts if the error in question were purged from the record.

The Court states that there can be no question about the defendants' guilt because the women "described in detail the repeated wanton acts of the defendants during three hours in two States, thus negating any doubt as to identification." *Ante*, at 511. I would not characterize their testimony—particularly that relating to identification—as "detailed."[9] It is, of course, true that the witnesses had ample opportunity to observe their assailants, and that there is no reason to question their sincerity. But each of the witnesses had different opportunities to view and identify the various defendants. Two of them could not identify one of the defendants in a lineup only a short time after the events took place.[10] Indeed, although the witnesses testified at trial that there were five men in the car that forced them off the road, in a prior statement one or more of them had said that there were four.[11] Hence the testimony at least leaves open the possibility of some confusion and some mistaken identification within the group.

I share the Court's reaction to the offensive character of the misconduct involved in this case. I believe, however, that this factor enhances the importance of making sure that procedural safeguards are followed and that there is no reasonable doubt concerning the guilt of each one of the five accused individuals. I do not believe the prosecutor committed procedural error in this case; if he did, however, I feel strongly that this Court should not make a clumsy effort to avoid another trial by undertaking a function that can better be performed by other judges. We, of course, would not want any of the victims to go through the ordeal of testifying again unless reversible error has been committed. On the other hand, we surely would not want one of the defendants to spend 40 years in jail just because the evidence against the other four is overwhelming.

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[9] For testimony regarding the descriptions of the suspects that the victims gave to the police, see Tr. of Suppression Hearing ("Plaintiff's Witnesses") 37, 119–120, 318–319; Tr. of Suppression Hearing ("Government Witness") 6, 45–47, 55–56; Tr. 648. See generally *id.*, at 114–129, 295–310, 407–423.

[10] Tr. of Suppression Hearing ("Plaintiff's Witnesses") 105–107; Tr. 235.

[11] *Id.*, at 193, 215–216, 222–223, 485–486, 885, 903–904, 906. Asked on cross-examination about this discrepancy, the witness explained: "[M]y mind has really been confused and I have to really sit and look back on things because I have been trying to forget everything." *Id.*, at 193. The Clark station attendant testified that there were four black men in the Cadillac. *Id.*, at 753.

Because I believe that there was no constitutional error in the prosecutor's remarks, I agree with the Court that the Fifth Amendment does not serve as a basis for reversal of these convictions. I concur in the Court's judgment but not in its opinion.[12]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

In this case the Court of Appeals issued an opinion reversing the convictions of the respondents. 660 F. 2d 301 (CA7 1981). Most of the opinion consists of a discussion of the facts. *Id.*, at 301–303. In its brief legal analysis, the court relied on its decision in *United States* v. *Buege*, 578 F. 2d 187 (1978), to find that the prosecutor had violated the respondents' Fifth Amendment rights by commenting on their failure to testify. 660 F. 2d., at 303. The court declined to apply the harmless-error doctrine to this violation. The court stated that an application of the doctrine "would impermissibly compromise the clear constitutional violation of [respondents'] Fifth Amendment rights." *Ibid.*

On its face, the Court of Appeals' opinion adopts a rule of automatic reversal for improper prosecutorial comment on a defendant's failure to testify. Such a rule was rejected by this Court in *Chapman* v. *California*, 386 U. S. 18, 22 (1967). The respondents argue that the Court of Appeals' decision to disregard *Chapman* was justified as an exercise of the court's supervisory powers. Brief for Respondents 15–36. I would reject this argument on the ground that the Court of Appeals did not invoke its supervisory powers or provide any explanation of why this might be an appropriate case for the exercise of such powers. In order to rely on its supervisory powers to reverse a conviction a court of appeals should be required, at the least, to invoke them expressly.[1] In view of the Court of Appeals' refusal to apply the harmless-error doctrine announced in *Chapman* and its failure to offer any reasons to justify its refusal, I would vacate the court's decision and remand the case for application of the harmless-error test announced by *Chapman* and a determination of whether the error in this case was harmless beyond a reasonable doubt.[2]

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[12] The Court reverses and remands to permit consideration of any remaining contentions by respondents that were not treated in the Court of Appeals' opinion, a disposition acknowledged by the Government to be appropriate. See Brief for United States 22, n. 18.

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[1] It is possible that a court of appeals might not always have to provide a detailed explanation of a decision to invoke its supervisory powers. If, for example, the court in a prior case had announced a new rule adopted pursuant to its supervisory powers it may not have to explain again in a subsequent case the considerations that supported adoption of the rule. At the least, however, the court should invoke expressly the previously announced rule in order to make clear the basis for its decision.

As the Court points out, *ante*, at 504–505, the Court of Appeals discussed the continuing problem of improper prosecutorial comment in *United States* v. *Rodriguez*, 627 F. 2d 110 (CA7 1980), which is cited in the court's opinion in this case. See 660 F. 2d, at 303. The Court states that the "*Rodriguez* court discussed, without explicitly adopting, the rule announced by the First Circuit in *United States* v. *Flannery*, 451 F. 2d 880, 882 (1971), that any prosecutorial reference to a defendant's failure to testify is *per se* grounds for reversal unless the judge immediately instructs the jury that the defendant had a constitutional right not to testify and advises the jury that the prosecutor's conduct was improper." *Ante*, at 504–505. In fact, the Court of Appeals *expressly declined* "to adopt so strict a rule." 627 F. 2d, at 113.

[2] As JUSTICE POWELL noted in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), the question of whether an error is harmless is "[n]ormally . . . a question more appropriately left to the courts below." *Id.*, at 102 (dissenting opinion). Accord, *Moore* v. *Illinois*, 434 U. S. 220, 232 (1977); *Coleman* v. *Alabama*, 399 U. S. 1, 11 (1970); *Foster* v. *California*, 394 U. S. 440, 444 (1969); *United States* v. *Wade*, 388 U. S. 218, 242 (1967). For reasons that are not clear, the Court declines to follow this practice in this case. See *ante*, at 510.

Instead of deciding the case on the grounds described above, the Court relies on prior decisions by the Court of Appeals to support an assumption that "without so stating, the court was exercising its supervisory powers to discipline the prosecutors of its jurisdiction." *Ante*, at 505. Based on this assumption, the Court poses its own question for review: "whether, on this record, in a purported exercise of supervisory powers, a reviewing court may ignore the harmless-error analysis of *Chapman*." *Ibid.* This question is not presented by the case. As noted, the Court of Appeals did not state that it was relying on its supervisory powers to reverse the convictions. It is sheer speculation for the Court to suggest that it was. Moreover, it is wholly inappropriate to address an important question concerning the scope of a federal appellate court's supervisory powers based on the Court of Appeals' decision in this case. Given the fact that the Court of Appeals did not expressly invoke its supervisory powers, it obviously also failed to detail the considerations that supported the exercise of such powers. The Court, therefore, has no explanation on which to base an analysis of the propriety of the Court of Appeals' assumed exercise of its supervisory powers. The respondents' effort to justify the Court of Appeals' disposition of this case based on an exercise of the court's supervisory powers provides no commission to this Court to decide important questions that are unnecessary to a decision in the case, are not presented by it, and cannot be analyzed carefully, if at all, based on the decision involved.

The problems posed by the Court of Appeals' failure to explain its decision are evident in the Court's discussion of supervisory powers. The Court suggests, for example, that "in this context, the integrity of the process carries less weight, for it is the essence of the harmless-error doctrine that a judgment may stand only when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.'" *Ante*, at 506 (citation omitted).

Unfortunately, we cannot be sure of the precise "context" in which this case arose. If, for example, the violation in this case was another in a long line of intentional violations of defendants' rights by Government prosecutors, the "context" might be considerably different. An assessment of the weight carried by the "integrity of the process" also might be affected substantially by evidence of this sort. It is difficult to imagine that a series of intentional violations of defendants' constitutional rights by Government prosecutors who are officers of the court charged with upholding the law would not have a considerable detrimental effect on the integrity of the process and call for judicial action designed to restore order and integrity to the process.

The Court also states that "deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of *Griffin* and where means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Ibid.* (footnotes omitted). Without disputing that a court of appeals generally should use means more narrowly tailored than reversal to deter improper prosecutorial conduct, there may be reasons why a court of appeals would reject the use of such means. Prior experience, for example, might have demonstrated the futility of relying on Department of Justice disciplinary proceedings.

The Court also states that "reversals of convictions under the court's supervisory power must be approached 'with some caution' . . . and with a view toward balancing the interests involved . . . ." *Ante*, at 506–507. The Court goes on to state that the "Court of Appeals failed in this case to give appropriate—if, indeed, any—weight to these relevant interests." *Ante*, at 507. According to the Court, the Court of Appeals "did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events." *Ibid.* In the Court's view, "[t]he conclusion is inescapable that the Court of Appeals focused exclusively on its concern that the prosecutors within its jurisdiction were indifferent to the frequent admonitions of the court." *Ibid.* In my view, what the Court of Appeals did or did not do is a matter of sheer speculation. In the absence of an explanation, the Court has no way of knowing what considerations motivated the Court of Appeals. The speculative and unwarranted nature of the Court's analysis is exacerbated by the fact that the Court must *assume* at the outset that the Court of Appeals in fact was relying on its supervisory powers.

The only thing of which we can be sure is that the Court of Appeals refused, without an adequate explanation, to apply the harmless-error doctrine. This error calls for vacating the judgment and remanding the case. See *supra*, at 520, and n. 2. It does not call for an extended discussion of the scope of an appellate court's supervisory powers, an examination of the relationship between those powers and the harmless-error rule, a rejection of the exercise of those powers in the absence of an explanation to inform the analysis, or an application of the harmless-error rule by this Court in the first instance.

Although the Court's opinion is not clear, it is possible that it could be read to establish a *per se* rule against use of the supervisory powers to reverse a conviction based on a harmless error. Compare *ante*, at 506, 509–510, n. 7, with *ante*, at 506–507, 509. See also *ante*, at 505 ("We hold that the harmless-error rule of *Chapman* . . . may not be avoided by an assertion of supervisory power, *simply* to justify a reversal of *these* criminal convictions" (emphasis supplied)). If the Court is attempting to establish a *per se* rule against using supervisory powers to reverse a conviction based on harmless error, the absence of an explanation by the Court of Appeals is not as great an impediment to its decision. The fact remains, however, that the question the Court chooses to resolve is not presented by the case and should not be reached. Although I would not reach the question, I do not believe that *Chapman*, or the fact that an error is harmless, necessarily precludes a court of appeals from exercising its supervisory powers to reverse a conviction.

In *Chapman* the Court addressed the question of whether a violation of the rule of *Griffin* v. *California*, 380 U. S. 609 (1965), can be held to be harmless. 386 U. S., at 20. In considering this question, the Court rejected a rule of automatic reversal. *Id.*, at 22. We noted the prevalence of harmless-error statutes or rules and stated that these rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Ibid.* In this light, we concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Ibid.*[3]

In *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), the plurality stated that "*Chapman* continued a trend away from the practice of appellate courts in this country and in England of 'revers[ing] judgments for the most trivial errors.'" *Id.*, at 82 (citation omitted). As the Court notes, the goal of the harmless-error rule is "'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.'" *Ante*, at 509 (citation omitted). *Chapman* also stands for the proposition that a criminal defendant is not entitled to reversal of his conviction if the constitutional violation at issue is subject to harmless-error analysis and, after the issue has been raised and the Government has carried its burden, the error is determined to be harmless within the meaning of *Chapman*. In this regard, the rule limits the remedies available to a criminal defendant whose rights have been violated, but it also advances the important social interest in not allowing harmless errors to upset otherwise valid criminal convictions.

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[3] The Court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . . ." 386 U. S., at 23. See *id.*, at 23, n. 8.

The harmless-error rule announced in *Chapman* is based on important jurisprudential and social policies and generally should be applied to constitutional errors which it covers. This is not to suggest, however, that application of the harmless-error rule is a constitutional imperative; nothing in *Chapman* suggests that the rule always must be applied, or that convictions tainted only by harmless error never may be reversed. *Chapman* stands only for the proposition that certain constitutional guarantees do not *themselves* require reversal for harmless violations. If there is *other* authority, aside from the constitutional provisions violated in the case, that supports either a decision not to apply the rule or to reverse a conviction even though the error at issue is harmless, *Chapman* does not stand as a bar to such action. Federal statutes and state law are two such sources of authority.[4] In my view, the supervisory powers of federal appellate courts provide another possible source of authority, under some carefully confined circumstances, either to forgo a harmless-error inquiry or to reverse a conviction even though the error at issue is harmless.

In *McNabb* v. *United States*, 318 U. S. 332 (1943), the Court stated that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.*, at 340. See also *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 225 (1946). In *Cupp* v. *Naughten*, 414 U. S. 141 (1973), the Court suggested that within the federal court system an "appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.*, at 146. In *Mesarosh* v. *United States*, 352 U. S. 1 (1956), the Court observed: "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted." *Id.*, at 14. See also *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124 (1956) ("The untainted administration of justice is certainly one of the most cherished aspects of our institutions"). Other cases have acknowledged the duty of reviewing courts to preserve the integrity of the judicial process. In *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), the Court stated: "We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it." *Id.*, at 648, n. 23. Finally, in *United States* v. *Payner*, 447 U. S. 727 (1980), the Court noted that "the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *Id.*, at 736, n. 8.[5]

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[4] See *Connecticut* v. *Johnson*, 460 U. S., at 88 (STEVENS, J., concurring in judgment) (*Chapman* "does not *require* a state appellate court to make a harmless-error determination; it merely *permits* the state court to do so in appropriate cases" (emphasis in original) (footnote omitted)). Similarly, Congress presumably could enact, consistent with the Constitution, a statute covering *Griffin* violations that would alter the rule in *Chapman*.

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[5] It is noteworthy that a majority of the Court in *Hampton* v. *United States*, 425 U. S. 484 (1976), a case involving the entrapment defense, suggested that supervisory powers possibly could be employed to bar conviction of a defendant based on outrageous police conduct even though the defendant might have been "predisposed." See *id.*, at 491, 493–495 (POWELL, J., concurring in judgment); *id.*, at 495, 497 (BRENNAN, J., dissenting).

These cases indicate that the policy considerations supporting the harmless-error rule and those supporting the existence of an appellate court's supervisory powers are not in irreconcilable conflict. Both the harmless-error rule and the exercise of supervisory powers advance the important judicial and public interest in the orderly and efficient administration of justice. Exercise of the supervisory powers also can further the strong public interest in the integrity of the judicial process. If Government prosecutors have engaged in a pattern and practice of intentionally violating defendants' constitutional rights, a court of appeals certainly might be justified in reversing a conviction, even if the error at issue is harmless, in an effort to deter future violations. If effective as a deterrent, the reversal could avert further damage to judicial integrity. Admittedly, using the supervisory powers to reverse a conviction under these circumstances appears to conflict with the public's interest in upholding otherwise valid convictions that are tainted only by harmless error. But it is certainly arguable that the public's interests in preserving judicial integrity and in insuring that Government prosecutors, as its agents, refrain from intentionally violating defendants' rights are stronger than its interest in upholding the conviction of a particular criminal defendant. Convictions are important, but they should not be protected at any cost.[6]

I have no occasion now to define the precise contours of supervisory powers or to explore the circumstances in which using them to reverse a conviction based on harmless error might be appropriate. This much, however, is clear: A court of appeals should exercise its supervisory powers to reverse a conviction based on harmless error only in the most extreme circumstances and only after careful consideration, and balancing, of all the relevant interests.[7] The policies supporting the harmless-error rule announced in *Chapman* should be given considerable, but not controlling, weight in that balance. In my view, there is nothing in *Chapman* that requires us to adopt a *per se* rule against using the supervisory powers to reverse a conviction based on harmless error. In light of the importance of the interests potentially at stake, it would be surprising if there were.[8]

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[6] The case is made even stronger if we consider, as the discussion in text does not, the interests of criminal defendants in having their constitutional rights protected. Whether or not an error ultimately is determined to be harmless, a defendant's rights still have been violated. Criminal defendants have an even stronger interest in being protected from intentional violations of their constitutional rights, especially in view of the difficulties surrounding harmless-error inquiries. As the court noted in *United States* v. *Rodriguez*, 627 F. 2d, at 113, "[a] defendant's liberty should not so often depend upon our struggle with the particular circumstances of a case to determine from a cold record whether or not the prosecutor's remarks were harmless."

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[7] Although the interests of a victim in a particular case are not relevant to determining whether to enforce the established rights of a criminal defendant, see *Morris* v. *Slappy*, *ante*, at 28–29, n. 10 (BRENNAN, J., concurring in result), the interests of a victim may be relevant to determining whether to invoke the supervisory powers to reverse a conviction in a particular case even though the error is harmless. Whether a continuing problem calls for the exercise of supervisory powers is a different question from whether a particular case is an appropriate context in which to exercise those powers.

[8] Like the Court, see *ante*, at 509–510, n. 7, I do not reach the question of whether 28 U. S. C. § 2111 is coextensive with *Chapman*. In any event, I do not think that it necessarily forecloses the exercise of supervisory powers.

PALLAS SHIPPING AGENCY, LTD. *v.* DURIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-502. Argued April 25, 1983—Decided May 23, 1983

Under § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (Act), an injured longshoreman who accepts "compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board" has six months in which to file a negligence action against a third party, after which time the longshoreman's cause of action is irrevocably assigned to his employer. Respondent was injured while working as a longshoreman aboard a vessel that had been chartered by petitioner's predecessor corporation. Respondent's employer (another company) did not contest his right to compensation under the Act and filed a form (Form LS-206) with the Labor Department indicating the employer's agreement to make payments to respondent. Approximately 23 months later, the employer terminated the payment of benefits by filing another form (Form LS-208) with the Department. Respondent subsequently filed suit in Federal District Court to recover for his injuries, alleging that they had been caused by the vessel charterer's negligence. The District Court dismissed the claim for lack of jurisdiction. The Court of Appeals reversed, holding that jurisdiction could properly be asserted over petitioner and that, in the absence of a formal compensation order or award entered by the Secretary of Labor, an employee's acceptance of compensation payments could not lead to an assignment of his right of action against third parties.

Held: Respondent's acceptance of voluntary compensation payments did not constitute acceptance of compensation "under an award in a compensation order" so as to give rise to the assignment of his claims against third parties under § 33(b). Pp. 532-539.

(a) Under the Act's comprehensive scheme governing the rights of an injured longshoreman, the term "compensation order" refers specifically to an administrative award of compensation. Here, no administrative proceedings ever took place. Although respondent's employer, as required by the Act, filed Forms LS-206 and LS-208 relating to voluntary payment of compensation, nothing in the Act suggests that the filing of the forms is equivalent to an "award in a compensation order." Pp. 532-535.

(b) The Act's history confirms that "a compensation order" does not include a document testifying to an employer's voluntary payment of compensation under the Act. The requirement of a formal award was

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designed to protect the longshoreman from the unexpected loss of his rights against a negligent third party by acceptance of voluntary compensation payments, and to permit him to make a considered choice among available remedies. Cf. *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U. S. 74; *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446. Pp. 535–538.

(c) The requirement of a formal compensation order prior to the assignment of an injured longshoreman's claims does not frustrate the Act's aims of ensuring prompt payment to injured workers and of relieving claimants and their employers of the undue expense and administrative burden of litigating compensation claims. Under Labor Department regulations, employers who desire to seek indemnification from a negligent third party may make voluntary compensation payments and obtain a compensation order upon request if there is no disagreement among the parties. Moreover, even without a statutory assignment of the longshoreman's claims, an employer can seek indemnification from negligent third parties for payments it has made to the longshoreman. Thus, an employer who seeks to bring an action against a shipowner, charterer, or other third person has little to gain from contesting his liability to the longshoreman under the Act. Pp. 538–539.

684 F. 2d 352, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

William D. Carle III argued the cause for petitioner. With him on the briefs was *Lucian Y. Ray*.

Thomas W. Gallagher argued the cause for respondent. With him on the briefs was *Frank W. Cubbon, Jr.**

JUSTICE MARSHALL delivered the opinion of the Court.

Under § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, an injured longshoreman who accepts

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**Francis X. Byrn* and *John M. Toriello* filed a brief for American President Lines, Ltd., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Lee, Deputy Solicitor General Geller, Richard G. Wilkins, T. Timothy Ryan, Jr., Karen I. Ward*, and *Mary-Helen Mautner* for the United States; by *Howard A. Specter, C. Arthur Rutter, Jr., Ross Diamond III*, and *Paul S. Edelman* for the Association of Trial Lawyers of America; and by *Charles Sovel* for Local 1291, International Longshoremen's Association, AFL-CIO, et al.

"compensation under an award in a compensation order" has six months in which to file a negligence action against a third party, after which time the longshoreman's cause of action is irrevocably assigned to his employer. This case presents the question whether a longshoreman's acceptance of voluntary compensation payments gives rise to an assignment under § 33(b).

I

On May 19, 1975, respondent Joseph Duris fell from a ladder and was injured while working as a longshoreman aboard the M/V *Regent Botan* at the Port of Toledo, Ohio. At the time of the accident, the vessel was chartered by Erato Shipping, Inc. Duris' employer, Toledo Overseas Terminal, Inc., did not contest his right to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). On June 2, 1975, the employer filed Form LS–206, entitled "Payment of Compensation Without Award," with the Department of Labor. The document indicated the employer's agreement to commence payments to Duris in the amount of $149.14 every two weeks. Payments to Duris continued for nearly two years. On April 26, 1977, the company terminated the payment of benefits by filing Form LS–208, labeled "Compensation Payment Stopped or Suspended."

On February 19, 1980, Duris commenced this action in the District Court for the Northern District of Ohio to recover for injuries suffered as a result of the accident aboard the M/V *Regent Botan*. An amended complaint named petitioner Pallas Shipping Agency, Ltd., as a defendant. Petitioner is a successor of Erato Shipping, Inc., the company which chartered the M/V *Regent Botan*. Duris alleged that the bareboat charterer had been negligent in maintaining the ladder from which he fell. The District Court dismissed respondent's claim for failure to establish *in personam* jurisdiction.

The Court of Appeals reversed. *Duris* v. *Erato Shipping, Inc.*, 684 F. 2d 352 (CA6 1982). After concluding that personal jurisdiction could properly be asserted over petitioner based on the acts of its predecessor corporation, the court considered the question whether the lapse of six months after Duris' acceptance of voluntary compensation payments triggered an assignment of his claim under § 33(b). The court held that, in the absence of a formal compensation order or award entered by the Secretary of Labor, an employee's acceptance of compensation payments cannot lead to an assignment of his right of action against third parties. In reaching this conclusion, the Court of Appeals declined to follow the decision of the Court of Appeals for the Fourth Circuit in *Liberty Mutual Ins. Co.* v. *Ameta & Co.*, 564 F. 2d 1097 (1977). We granted certiorari to resolve this intercircuit conflict, 459 U. S. 1014 (1982), and we now affirm.

II

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* (1976 ed. and Supp. V), provides a comprehensive scheme governing the rights of an injured longshoreman. If, as is generally true in cases in which a longshoreman files a claim under the Act, his employer does not contest liability, the employer must pay compensation to the disabled longshoreman within two weeks of learning of his injury, 33 U. S. C. § 914; 20 CFR §§ 702.231–702.232 (1982), and must file an appropriate form, Form LS–206, with the Deputy Commissioner in the Department of Labor. 33 U. S. C. § 914; 20 CFR § 702.234 (1982).

When an employer controverts a compensation claim or the injured longshoreman contests actions taken by the employer with respect to his claim, the dispute may be resolved in administrative proceedings. 33 U. S. C. § 919 (1976 ed. and Supp. V). If the dispute cannot be resolved informally under procedures developed by the Department of Labor, 20

CFR §§ 702.301–702.319 (1982), the contested claim will proceed to a formal hearing, which culminates in the entry of an order by the Deputy Commissioner "reject[ing] the claim or mak[ing] an award in respect of the claim." 33 U. S. C. §§ 919(c), 919(e).[1] An order making an award, referred to as "a compensation order," 33 U. S. C. § 919(e), is reviewable by the Benefits Review Board, 33 U. S. C. § 921(b) (1976 ed. and Supp. V), and enforceable in federal court. 33 U. S. C. § 921(d). An employer's failure to make timely payments under a compensation order results in a substantial penalty. 33 U. S. C. § 914(f).

Although workers' compensation generally constitutes a longshoreman's exclusive recovery from his employer, a longshoreman who accepts compensation does not thereby relinquish any claim against the shipowner, charterer, or other third party. 33 U. S. C. § 933(a). Under § 33(b) of the Act, however, a longshoreman who accepts "compensation under an award in a compensation order" must sue the third party within six months, or not at all. If the employee fails to bring suit within this period, his cause of action is irrevocably assigned to his employer. See *Rodriguez* v. *Compass Shipping Co.*, 451 U. S. 596 (1981). Section 33(b) provides in full:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against

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[1] Even if § 19(c) of the Act, 33 U. S. C. § 919(c), requires the Deputy Commissioner to issue an order with respect to any uncontested compensation claim, as petitioner argues, cf. *Czaplicki* v. *The Hoegh Silvercloud*, 351 U. S. 525, 528, n. 9 (1956), it is not disputed that in this case no compensation order was filed by the Deputy Commissioner prior to Duris' commencement of the instant lawsuit.

> such third person within six months after such award." 44 Stat. 1440, as amended, 33 U. S. C. § 933(b).

Petitioner contends that the voluntary payment of compensation benefits to Duris, along with the filing of Forms LS-206 and LS-208 with the Department of Labor, constituted an "award in a compensation order" which resulted in an assignment of Duris' claim to his employer when he failed to bring suit within the next six months.

We disagree. Section 33(b) triggers an assignment of an injured longshoreman's cause of action against a third party only after he has accepted compensation "under an award *in a compensation order* filed by the deputy commissioner or Board." (Emphasis added.) The term "compensation order" in the LHWCA refers specifically to an administrative award of compensation following proceedings with respect to the claim. 33 U. S. C. § 919(e).[2] In this case, no administrative proceedings ever took place, and no award was ever ordered by the Deputy Commissioner.

Petitioner correctly points out that Duris' employer filed Forms LS-206 and LS-208 as required by 33 U. S. C. § 914(c) to "notify the deputy commissioner . . . that payment of compensation has begun or has been suspended." But such filings are distinguishable from compensation orders in form, function, and legal effect: they are not issued by the Deputy Commissioner; they are neither administratively reviewable nor judicially enforceable; and the failure to make timely payments pursuant to the agreement embodied in Form LS-206 results in a less substantial penalty than a failure to comply with the terms of a compensation order.

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[2] Section 19(e) of the Act, 33 U. S. C. § 919(e), provides:

"The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each."

33 U. S. C. §§ 914(e), (f).[3] Nothing in the Act suggests that the filing of these forms is equivalent to "an award in a compensation order."

The history of the LHWCA confirms that "a compensation order" was not intended to include a document testifying to an employer's voluntary payment of compensation under the Act. This statutory language was first incorporated into § 33(b) when the LHWCA was amended in 1938.[4] As we described in *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U. S. 74, 79 (1980):

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[3] Section 14(f) of the Act, 33 U. S. C. § 914(f), provides that if any compensation payable under the terms of an award is not paid within 10 days after it becomes due, the employer shall be required to pay an additional amount equal to 20% of the unpaid compensation unless a stay of payment is issued by the Benefits Review Board or by a court pending review of the compensation order.

Section 14(e), 33 U. S. C. § 914(e), provides that if any compensation payable in the absence of an award is not paid within 14 days, the employer shall be required to pay an additional amount equal to 10% of the unpaid compensation unless the employer files notice controverting the right to compensation or such nonpayment is excused by the Deputy Commissioner.

[4] As originally enacted, § 33 provided:

"(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election." 44 Stat. 1440.

As amended in 1938, § 33 provided in relevant part:

"(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person." 52 Stat. 1168.

> "[T]he Act [as originally enacted in 1927] required a longshoreman to choose between the receipt of a compensation award from his employer and a damages suit against the third party. Act of Mar. 4, 1927, §33, 44 Stat. 1440. If the longshoreman elected to receive compensation, his right of action was automatically assigned to his employer. In 1938, however, Congress provided that in cases in which compensation was not made pursuant to an award by a deputy commissioner . . . , the longshoreman would not be required to choose between the compensation award and an action for damages. Under the 1938 amendments, no election was required unless compensation was paid pursuant to such an award. See Act of June 25, 1938, ch. 685, §§12, 13, 52 Stat. 1168."

The requirement of a formal award was designed to protect the longshoreman from the unexpected loss of his rights against a negligent third party and to permit him to make a considered choice among available remedies. As the House Committee explained:

> "Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person . . . to consider the acceptance of compensation from the employer with the resultant loss of right to bring suit in damages against the third party. . . ." H. R. Rep. No. 1945, 75th Cong., 3d Sess., 9 (1938).

Thus, as this Court recognized in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 454–456 (1947), Congress clearly did not contemplate that the mere acceptance of compensation benefits, in the absence of an award by the Deputy Commissioner, would trigger an immediate assignment of the longshoreman's claim against third persons, for such voluntary payments would not adequately apprise the longshoreman of the election of remedies.

In 1959 Congress eliminated the harsh election-of-remedies requirement.[5] As amended, § 33(b) allows a longshoreman to bring a suit against a third party within six months after accepting payments under "an award in a compensation order." There is no indication, however, that Congress intended to alter this statutory language governing the prerequisites for an assignment of the longshoreman's right of action. To the contrary, Congress indicated that its aim in amending § 33 was "to continue the current judicial construction" of the retained portions of the provision. 105 Cong. Rec. 9226 (1959). As noted above, this Court had previously concluded in *American Stevedores, Inc.* v. *Porello*, *supra*, that an assignment occurred under § 33(b) only after a longshoreman accepted an award by the Deputy Commissioner.

Moreover, the Act continues to equate a "compensation order" with the formal document filed by the Deputy Commissioner at the conclusion of administrative proceedings, as it has since the LHWCA was enacted. See §§ 19, 21–22, 44 Stat. 1435–1437. Finally, limiting § 33(b) to formal compensation orders continues to serve the underlying congressional purposes even though the statute no longer requires an immediate election of remedies. Service of the compensation order puts the longshoreman on notice that his acceptance of future compensation payments will result in the irrevocable assignment of his claims, albeit not immediately but six months later. Of equal importance, the requirement of a formal compensation order enhances an injured longshoreman's opportunity to make a well-considered decision whether to bring an action against a third party by allowing him to delay his decision until the amount of compensation to which he is entitled under the Act is clearly established in a judicially enforceable order.

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[5] As we explained in *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U. S. 74, 80 (1980):

"In 1959, Congress amended the Act to delete the election-of-remedies requirement altogether. Act of Aug. 18, 1959, 73 Stat. 391. Existing law was felt to 'wor[k] a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party.' S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959). The result was that an injured employee 'usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit.' *Ibid.*; see H. R. Rep. No. 229, 86th Cong., 1st Sess. (1959)."

Petitioner contends that the requirement of a formal compensation order prior to the assignment of an injured longshoreman's claims will frustrate the Act's aims of ensuring prompt payment to injured workers and of relieving claimants and their employers of the undue expense and administrative burden of litigating compensation claims. It is said that employers who desire to seek indemnification from the negligent third party will be encouraged to contest their liability in order to obtain a compensation order instead of making voluntary payments. We do not find this contention persuasive. Employers are not required to contest their liability in order to obtain a formal compensation award. Department of Labor regulations permit an employer who makes voluntary payments to obtain a compensation order upon request if there is no disagreement among the parties. 20 CFR § 702.315(a) (1982). Moreover, even without a statutory assignment of the longshoreman's claims, an employer can seek indemnification from negligent third parties for payments it has made to the longshoreman. See *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U. S. 404 (1969); *Crescent Wharf & Warehouse Co.* v. *Barracuda Tanker Corp.*, 696 F. 2d 703 (CA9 1983). For these reasons, the employer who seeks to bring an action against a shipowner, charterer, or other third person has little to gain from contesting his liability to the longshoreman under the LHWCA.

We therefore conclude that respondent's acceptance of voluntary compensation payments did not constitute "[a]cceptance of such compensation under an award in a compensation order" so as to give rise to the assignment of respondent's claims against third persons. Accordingly, the judgment of the Court of Appeals is

Affirmed.

REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* TAXATION WITH REPRESENTATION OF WASHINGTON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81–2338. Argued March 22, 1983—Decided May 23, 1983*

Section 501(c)(3) of the Internal Revenue Code of 1954 (Code) grants tax exemption to certain nonprofit organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation." Section 170(c)(2) permits taxpayers who contribute to § 501(c)(3) organizations to deduct the amount of their contributions on their federal income tax returns. Section 501(c)(4) grants tax-exempt status to certain nonprofit organizations but contributions to these organizations are not deductible. Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote its view of the "public interest" in the area of federal taxation; it was formed to take over the operation of two other nonprofit organizations, one of which had tax-exempt status under § 501(c)(3) and the other under § 501(c)(4). The Internal Revenue Service denied TWR's application for tax-exempt status under § 501(c)(3), because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation. TWR then brought suit in Federal District Court against the Commissioner of Internal Revenue, the Secretary of the Treasury, and the United States, claiming that § 501(c)(3)'s prohibition against substantial lobbying is unconstitutional under the First Amendment by imposing an "unconstitutional burden" on the receipt of tax-deductible contributions, and is also unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause because the Code permits taxpayers to deduct contributions to veterans' organizations that qualify for tax exemption under § 501(c)(19). The District Court granted summary judgment for the defendants, but the Court of Appeals reversed, holding that § 501(c)(3) does not violate the First Amendment but does violate the Fifth Amendment.

Held:

1. Section 501(c)(3) does not violate the First Amendment. Congress has not infringed any First Amendment rights or regulated any First

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*Together with No. 82–134, *Taxation With Representation of Washington* v. *Regan, Secretary of the Treasury, et al.*, also on appeal from the same court.

Amendment activity but has simply chosen not to subsidize TWR's lobbying out of public funds. *Cammarano* v. *United States*, 358 U. S. 498. Pp. 545–546.

2. Nor does § 501(c)(3) violate the equal protection component of the Fifth Amendment. The sections of the Code at issue do not employ any suspect classification. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right and thus is not subject to strict scrutiny. It was not irrational for Congress to decide that tax-exempt organizations such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying. Nor was it irrational for Congress to decide that, even though it will not subsidize lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Pp. 546–551.

219 U. S. App. D. C. 117, 676 F. 2d 715, reversed.

REHNQUIST, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 551.

Solicitor General Lee argued the cause for appellants in No. 81–2338. With him on the briefs were *Assistant Attorney General Archer, Deputy Solicitor General Wallace, Stuart A. Smith, Richard Farber*, and *Robert S. Pomerance.*

John Cary Sims argued the cause for appellee in No. 81–2338. With him on the brief were *Alan B. Morrison* and *Thomas F. Field.*†

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax-exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).[1]

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†Briefs of *amici curiae* urging reversal were filed by *Sheldon S. Cohen, Julie Noel Gilbert, Dennis B. Drapkin, George H. Gangwere*, and *Wilmer S. Schantz, Jr.*, for the Veterans of Foreign Wars of the United States; by *Joseph C. Zengerle* and *Zachary R. Karol* for the Disabled American Veterans et al.; and by *Mitchell Rogovin* and *George T. Frampton, Jr.*, for the American Legion.

Thomas A. Troyer, H. David Rosenbloom, Albert G. Lauber, Jr., and *John G. Milliken* filed a brief for the American Association of Museums et al. as *amici curiae* urging affirmance.

TWR then brought this suit in District Court against the appellants, the Commissioner of Internal Revenue, the Secretary of the Treasury, and the United States, seeking a declaratory judgment that it qualifies for the exemption granted by § 501(c)(3). It claimed the prohibition against substantial lobbying is unconstitutional under the First Amendment and the equal protection component of the Fifth Amendment's Due Process Clause.[2] The District Court granted summary judgment for appellants. On appeal, the en banc Court of Appeals for the District of Columbia Circuit reversed, holding that § 501(c)(3) does not violate the First Amendment but does violate the Fifth Amendment. 219 U. S. App. D. C. 117, 676 F. 2d 715 (1982). Appellants appealed pursuant to 28 U. S. C. § 1252, and TWR cross-appealed. We noted probable jurisdiction of the appeal, 459 U. S. 819 (1982).[3]

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[1] Section § 501(c)(3) grants exemption to:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office" (emphasis supplied).

[2] The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States. *E. g.*, *Schweiker* v. *Wilson*, 450 U. S. 221, 226, n. 6 (1981).

TWR was formed to take over the operations of two other nonprofit corporations. One, Taxation With Representation Fund, was organized to promote TWR's goals by publishing a journal and engaging in litigation; it had tax-exempt status under § 501(c)(3). The other, Taxation With Representation, attempted to promote the same goals by influencing legislation; it had tax-exempt status under § 501(c)(4).[4] Neither predecessor organization was required to pay federal income taxes. For purposes of our analysis, there are two principal differences between § 501(c)(3) organizations and § 501(c)(4) organizations. Taxpayers who contribute to § 501(c)(3) organizations are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible. Section 501(c)(4) organizations, but not § 501(c)(3) organizations, are permitted to engage in substantial lobbying to advance their exempt purposes.

In these cases, TWR is attacking the prohibition against substantial lobbying in § 501(c)(3) because it wants to use tax-deductible contributions to support substantial lobbying activities. To evaluate TWR's claims, it is necessary to understand the effect of the tax-exemption system enacted by Congress.

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[3] Appellants contend that we lack jurisdiction of the cross-appeal because 28 U. S. C. § 1252 refers only to appeals, and this Court's Rule 12.4 only establishes a procedure for taking a cross-appeal. Section 1252 provides:

> "*Any party* may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States or any of its agencies . . . is a party" (emphasis supplied).

This language is broad enough to encompass appellee's cross-appeal. We hold that it does. Therefore, we deny the appellants' motion to dismiss, and decide the cross-appeal together with the appeal.

[4] Unless otherwise indicated, all citations to statutes in this opinion refer to the Internal Revenue Code, 26 U. S. C.

Section 501(c)(4) grants exemption to:

> "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.[5] The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

It appears that TWR could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.[6]

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[5] In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical. See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674–676 (1970); *id.*, at 690–691 (BRENNAN, J., concurring); *id.*, at 699 (opinion of Harlan, J.).

[6] TWR and some *amici* are concerned that the IRS may impose stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying, and effectively make it impossible for a § 501(c)(3) organization to

TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment. It claims, relying on *Speiser* v. *Randall*, 357 U. S. 513 (1958), that the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an "unconstitutional condition" on the receipt of tax-deductible contributions. In *Speiser*, California established a rule requiring anyone who sought to take advantage of a property tax exemption to sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. This Court stated that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*, at 518.

TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. See *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model. The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

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establish a § 501(c)(4) lobbying affiliate. No such requirement in the Code or regulations has been called to our attention, nor have we been able to discover one. The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome.

We also note that TWR did not bring this suit because it was unable to operate with the dual structure and seeks a less stringent set of bookkeeping requirements. Rather, TWR seeks to force Congress to subsidize its lobbying activity. See Tr. of Oral Arg. 37–39.

This aspect of these cases is controlled by *Cammarano* v. *United States*, 358 U. S. 498 (1959), in which we upheld a Treasury Regulation that denied business expense deductions for lobbying activities. We held that Congress is not required by the First Amendment to subsidize lobbying. *Id.*, at 513. In these cases, as in *Cammarano*, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Id.*, at 515 (Douglas, J., concurring).[7]

TWR also contends that the equal protection component of the Fifth Amendment renders the prohibition against substantial lobbying invalid. TWR points out that § 170(c)(3) permits taxpayers to deduct contributions to veterans' organizations that qualify for tax exemption under § 501(c)(19). Qualifying veterans' organizations are permitted to lobby as much as they want in furtherance of their exempt purposes.[8]

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[7] *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U. S. 290 (1981), upon which TWR relies, is not to the contrary. In that case the challenged ordinance regulated First Amendment activity by limiting individuals' expenditures of their own money on political speech.

TWR contends that Congress has overruled *Cammarano* by enacting § 162(e), which permits businesses to deduct certain lobbying expenses that are "ordinary and necessary [business] expenses." See Brief for Appellee 13. It is elementary that Congress' decision to permit deductions does not affect this Court's holding that refusing to permit them does not violate the Constitution.

[8] The rules governing deductibility of contributions to veterans' organizations are not the same as the analogous rules for § 501(c)(3) organizations. For example, an individual may generally deduct up to 50% of his adjusted gross income in contributions to § 501(c)(3) organizations, but only 20% in contributions to veterans' organizations. Compare § 170(b)(1)(A) with § 170(b)(1)(B). Taxpayers are permitted to carry over excess contributions to § 501(c)(3) organizations, but not veterans' organizations, to

TWR argues that because Congress has chosen to subsidize the substantial lobbying activities of veterans' organizations, it must also subsidize the lobbying of § 501(c)(3) organizations.

Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race. *E. g., Harris* v. *McRae*, 448 U. S. 297, 322 (1980). Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. More than 40 years ago we addressed these comments to an equal protection challenge to tax legislation:

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is

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the next year. § 170(d). There are other differences. If it were entitled to equal treatment with veterans' organizations, TWR would, of course, be entitled only to the benefits they receive, not to more.

> on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden* v. *Kentucky*, 309 U. S. 83, 87–88 (1940) (footnotes omitted).

See also *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 40–41 (1973); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359–360 (1973).

We have already explained why we conclude that Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment activities. The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "'ai[m] at the suppression of dangerous ideas.'" *Cammarano*, *supra*, at 513, quoting *Speiser*, 357 U. S., at 519. But the veterans' organizations that qualify under § 501(c)(19) are entitled to receive tax-deductible contributions regardless of the content of any speech they may use, including lobbying. We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect. The sections of the Internal Revenue Code here at issue do not employ any suspect classification. The distinction between veterans' organizations and other charitable organizations is not at all like distinctions based on race or national origin.

The Court of Appeals nonetheless held that "strict scrutiny" is required because the statute "*affect[s]* First Amendment rights on a discriminatory basis." 219 U. S. App. D. C., at 130, 676 F. 2d, at 728 (emphasis supplied). Its opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. This is not the law. Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combating teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.

Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. *United States* v. *Realty Co.*, [163 U. S. 427,] 444 [(1896)]." *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 317 (1937). See also, *id.*, at 313; *Alabama* v. *Texas*, 347 U. S. 272 (1954). For the purposes of these cases appropriations are comparable to tax exemptions and deductions, which are also "a matter of grace [that] Congress can, of course, disallow . . . as it chooses." *Commissioner* v. *Sullivan*, 356 U. S. 27, 28 (1958).

These are scarcely novel principles. We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley* v. *Valeo*, 424 U. S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Id.*, at 93–108. *Harris* v. *McRae*, *supra*, and *Maher* v. *Roe*, 432 U. S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.

The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, 448 U. S., at 316. Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318. As we said in *Maher*, "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law . . . ." 432 U. S., at 476. Where governmental provision of subsidies is not "'aimed at the suppression of dangerous ideas,'" *Cammarano*, 358 U. S., at 513, its "power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher*, *supra*, at 476.

We have no doubt but that this statute is within Congress' broad power in this area. TWR contends that § 501(c)(3) organizations could better advance their charitable purposes if they were permitted to engage in substantial lobbying. This may well be true. But Congress—not TWR or this Court—has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying. It appears that Congress was concerned that exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members. See 78 Cong. Rec. 5861 (1934) (remarks of Sen. Reed); *id.*, at 5959 (remarks of Sen. La Follette). It is not irrational for Congress to decide that tax-exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying.

It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Veterans have "been obliged to drop their own affairs to take up the burdens of the nation," *Boone* v. *Lightner*, 319

U. S. 561, 575 (1943), "'subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.'" *Johnson* v. *Robison*, 415 U. S. 361, 380 (1974) (emphasis deleted). Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.[9] This policy has "always been deemed to be legitimate." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279, n. 25 (1979).

The issue in these cases is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring.

I join the Court's opinion. Because 26 U. S. C. § 501's discrimination between veterans' organizations and charitable organizations is not based on the content of their speech, *ante*, at 548, I agree with the Court that § 501 does not deny charitable organizations equal protection of the law. The benefit provided to veterans' organizations is rationally based on the Nation's time-honored policy of "compensating veterans for their past contributions." *Ante*, this page. As the Court says, *ante*, at 548 and 550, a statute designed to discourage the expression of particular views would present a very different question.

I also agree that the First Amendment does not require the Government to subsidize protected activity, *ante*, at 546, and that this principle controls disposition of TWR's First Amendment claim. I write separately to make clear that in my view the result under the First Amendment depends entirely upon the Court's necessary assumption—which I share—about the manner in which the Internal Revenue Service administers § 501.

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[9] See, *e. g.*, *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979) (veterans' preference in civil service employment); *Johnson* v. *Robison*, 415 U. S. 361 (1974) (educational benefits).

If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle, reaffirmed today, *ante*, at 545, "that the government may not deny a benefit to a person because he exercises a constitutional right." Section 501(c)(3) does not merely deny a subsidy for lobbying activities, see *Cammarano* v. *United States*, 358 U. S. 498 (1959); it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is "substantial lobbying." Because lobbying is protected by the First Amendment, *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 137–138 (1961), § 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.*

The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4). As the Court notes, *ante*, at 544, TWR may use its present § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying.

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*See *Speiser* v. *Randall*, 357 U. S. 513, 518–519 (1958); *Cammarano* v. *United States*, 358 U. S. 498, 515 (1959) (Douglas, J., concurring) (denial of business-expense deduction for lobbying is constitutional, but an attempt to deny all deductions for business expenses to a taxpayer who lobbies would penalize unconstitutionally the exercise of First Amendment rights); cf. *Harris* v. *McRae*, 448 U. S. 297, 317, n. 19 (1980) (denial of welfare benefits for abortion is constitutional, but an attempt to withhold all welfare benefits from one who exercises right to an abortion probably would be impermissible); *Maher* v. *Roe*, 432 U. S. 464, 474–475, n. 8 (1977) (same).

The § 501(c)(4) affiliate would not be eligible to receive tax-deductible contributions.

Given this relationship between § 501(c)(3) and § 501(c)(4), the Court finds that Congress' purpose in imposing the lobbying restriction was merely to ensure that "no tax-deductible contributions are used to pay for substantial lobbying." *Ante*, at 544, n. 6; see *ante*, at 545. Consistent with that purpose, "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Ante*, at 545, n. 6. As long as the IRS goes no further than this, we perhaps can safely say that "[t]he Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." *Ante*, at 545. A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.

Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. See *ante*, at 544–545, n. 6. In my view, any such restriction would render the statutory scheme unconstitutional.

I must assume that the IRS will continue to administer §§ 501(c)(3) and 501(c)(4) in keeping with Congress' limited purpose and with the IRS's duty to respect and uphold the Constitution. I therefore agree with the Court that the First Amendment questions in these cases are controlled by *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959), rather than by *Speiser* v. *Randall*, 357 U. S. 513, 518–519 (1958), and *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972).

UNITED STATES *v.* EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1062. Argued January 18, 1983—Decided May 23, 1983

The Bank Secrecy Act of 1970, 31 U. S. C. § 1101, requires persons knowingly transporting monetary instruments exceeding $5,000 into the United States to file a report with the Customs Service declaring the amount transported. The Government is authorized under 31 U. S. C. § 1102(a) to seize and forfeit any monetary instruments for which the required report was not filed. On September 10, 1975, claimant Vasquez, upon arrival at Los Angeles International Airport from Canada, declared that she was not carrying more than $5,000 in currency, but a customs inspector discovered and seized from her $8,850 in United States currency. On September 18, 1975, the Customs Service informed Vasquez by letter that the seized currency was subject to forfeiture and that she had a right to petition for remission or mitigation. A week later, she filed such a petition. Thereafter, from October 1975 to April 1976, the Customs Service, suspecting Vasquez of narcotics violations, conducted an investigation of the petition, but concluded, after contacting federal, state, and Canadian law enforcement officials, that there was no evidence of any violations. Vasquez, however, was indicted in June 1976 for, and convicted in December 1976 of, knowingly and willfully making false statements to a customs officer. In March 1977, a complaint seeking forfeiture of the currency under 31 U. S. C. § 1102(a) was filed in Federal District Court. Vasquez claimed that the 18-month delay between the seizure of the currency and the filing of the forfeiture action violated her right to due process, but the District Court held that the time that had elapsed was reasonable under the circumstances and declared the currency forfeited. The Court of Appeals reversed and ordered dismissal of the forfeiture action.

Held: On the facts, the Government's 18-month delay in filing a civil proceeding for forfeiture of the currency did not violate the claimant's right to due process of law. Pp. 562–570.

(a) The balancing test of *Barker* v. *Wingo*, 407 U. S. 514, developed to determine when Government delay has abridged the right to a speedy trial, provides the relevant framework for determining whether the delay in filing a forfeiture action was reasonable. That test involves a weighing of four factors: length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Pp. 562–565.

(b) In this case, the balance of factors under the *Barker* test indicates that the Government's delay in instituting civil forfeiture proceedings was reasonable. Although the 18-month delay was a substantial period of time, it was justified where there is no evidence that the Government's investigation of the petition for remission or mitigation was not pursued with diligence or that the Government was responsible for the slow pace of the criminal proceedings. Nor is there any evidence that Vasquez desired early commencement of a civil forfeiture proceeding, she never having used the available remedies to seek return of the seized currency, and she has never alleged or shown that the delay prejudiced her ability to defend against the forfeiture. Pp. 565–570.

645 F. 2d 836, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 570.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Carter G. Phillips*, *John Fichter De Pue*, and *David B. Smith*.

Victor Sherman argued the cause for claimant Vasquez. With him on the brief was *Paul L. Gabbert*.

JUSTICE O'CONNOR delivered the opinion of the Court.

United States Customs officials seized $8,850 in currency from the claimant as she passed through customs at Los Angeles International Airport. The question in this case is whether the Government's 18-month delay in filing a civil proceeding for forfeiture of the currency violates the claimant's right to due process of law. We conclude that the four-factor balancing test of *Barker* v. *Wingo*, 407 U. S. 514 (1972), provides the relevant framework for determining whether the delay in filing a forfeiture action was reasonable. Applying the *Barker* test to the circumstances of this case, we find no unreasonable delay.

I

A

Section 231 of the Bank Secrecy Act of 1970, 84 Stat. 1122, 31 U. S. C. § 1101, requires persons knowingly transporting monetary instruments exceeding $5,000 into the United States to file a report with the Customs Service declaring the amount being transported. Congress has authorized the Government to seize and forfeit any monetary instruments for which a required report was not filed. 31 U. S. C. § 1102(a). Since the Bank Secrecy Act does not specify the procedures to be followed in seizing monetary instruments, the Customs Service generally follows the procedures governing forfeitures for violations of the customs laws, as set forth in 19 U. S. C. § 1602 *et seq.* (1976 ed. and Supp. V), and the implementing regulations. Under these procedures, the Customs Service notifies any person who appears to have an interest in the seized property of the property's liability to forfeiture and of the claimant's right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture.[1] See 19 CFR § 162.31(a) (1982). The regulations require a claimant to file the petition within 60 days. 19 CFR § 171.12(b) (1982).

If the claimant does not file a petition, or if the decision on a petition makes legal proceedings appear necessary,[2] the appropriate customs officer must prepare a full report of the seizure for the United States Attorney. 19 U. S. C. § 1603 (1976 ed., Supp. V).[3] Upon receipt of a report, the United States Attorney is required "immediately to inquire into the facts" and, if it appears probable that a forfeiture has been incurred, "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay." 19 U. S. C. § 1604 (1976 ed., Supp. V). After a case is reported to the United States Attorney for institution of legal proceedings, no administrative action may be taken on any petition for remission or mitigation. 19 CFR § 171.2(a) (1982).

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[1] In addition to the general remission provisions of Title IV, Title II of the Bank Secrecy Act contains its own remission provision, 31 U. S. C. § 1104: "The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just."

[2] At the time of the seizure in this case, a customs officer could institute nonjudicial, summary forfeiture proceedings if the value of the seized merchandise was not more than $2,500. See 19 U. S. C. §§ 1607–1609. Congress has since raised this limit to $10,000. 19 U. S. C. § 1607 (1976 ed., Supp. V). Even for a seizure of property appraised at less than $10,000, the claimant has a right to a judicial determination upon posting a $250 bond to cover costs. 19 U. S. C. § 1608.

The Customs Service processes over 50,000 noncontraband forfeitures per year. U. S. Customs Service, Customs U. S. A. 36 (1982). In 90% of all seizures, the claimant files an administrative petition for remission or mitigation. Brief for United States 7. The Secretary in turn grants at least partial relief for an estimated 75% of the petitions. *Ibid.* Typically, this relief terminates the dispute without the filing of a forfeiture action in district court.

B

On September 10, 1975, claimant Mary Josephine Vasquez and a companion arrived at Los Angeles International Airport after a short visit to Canada. During customs processing, Vasquez declared that she was not carrying more than $5,000 in currency. Nevertheless, a customs inspector discovered and seized $8,850 in United States currency from her. On September 18, 1975, the Customs Service officially informed Vasquez by letter that the seized currency was subject to forfeiture and that she had the right to petition for remission or mitigation. A week later, Vasquez filed a petition for remission or mitigation,[4] asserting that the violation was unintentional because she had mistakenly believed she was required to declare only funds that had been obtained in another country and that she had brought the seized funds with her from the United States.

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[3] At the time of the seizure of the currency from Vasquez, 19 U. S. C. § 1603 contained no requirement of a prompt report of a seizure by the Customs Service to the United States Attorney for purposes of instituting forfeiture proceedings. As amended in 1978, § 1603 now requires the appropriate customs officer "to report promptly" to the United States Attorney whenever legal proceedings "in connection with such seizure or discovery are required." 19 U. S. C. § 1603 (1976 ed., Supp. V).

On October 20, 1975, the Customs Office of Investigation assigned Special Agent Pompeo to investigate the petition. Within a few days, Agent Pompeo had interviewed the customs inspectors at the airport who were involved in the seizure. After several unsuccessful attempts to contact him, in mid-November Agent Pompeo contacted Vasquez' attorney to arrange an interview with Vasquez. The attorney was unable to meet at that time, and he desired to be present during the interview with his client. Around this time, Agent Pompeo also opened a criminal file because she suspected Vasquez of smuggling drugs. From November 1975 until April 1976, Agent Pompeo contacted various state, federal, and Canadian law enforcement officials to determine whether the seized currency was part of a narcotics transaction.[5]

In January 1976, Vasquez' attorney inquired about the status of the petition, and was informed it was still under investigation. On March 2, 1976, Agent Pompeo again contacted the attorney regarding an interview with Vasquez, and an interview took place three days later. On April 26, 1976, the attorney again inquired about the status of the petition and requested that it be acted on as soon as possible. Also in April 1976, Agent Pompeo received final reports from the law enforcement agencies. From these reports, Agent

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[4] On September 11, 1975, the day after the seizure, Vasquez' counsel had written an informal letter to the District Director of Customs, explaining why she had not declared the money.

[5] This inquiry was relevant to the reporting violation. A currency reporting violation is normally a misdemeanor, but a reporting violation committed in furtherance of any other federal offense is a felony. Compare 31 U. S. C. § 1058 with 31 U. S. C. § 1059.

Pompeo concluded there was no evidence to support a charge of narcotics violations.

In May 1976, Agent Pompeo submitted a report to the United States Attorney, recommending prosecution of Vasquez for the reporting violation. After Agent Pompeo reinterviewed the customs agents and reported her findings, the United States Attorney submitted the case to the grand jury. On June 15, 1976, a grand jury returned an indictment charging Vasquez with the felony of knowingly and willfully making false statements to a United States Customs officer, in violation of 18 U. S. C. § 1001; and with the misdemeanor of knowingly and willfully transporting $8,850 into the United States without filing a report, in violation of 31 U. S. C. §§ 1058 and 1101. The indictment sought forfeiture of the currency as part of the misdemeanor count.

In August 1976, Agent Pompeo recommended that disposition of the remission petition be withheld until the currency was no longer needed as evidence at the criminal trial. On December 24, 1976, Vasquez was convicted on the felony count but acquitted on the misdemeanor charge of willfully failing to file a currency report.[6] Four days after the criminal trial was completed, Vasquez' attorney again inquired whether there would be any further delay in acting on the petition.

On March 10, 1977, the Customs Service informed Vasquez that the claim of forfeiture had been referred to the United States Attorney. Within two weeks, a complaint seeking forfeiture under 31 U. S. C. § 1102 was filed in Federal District Court.[7] In answer to the complaint, Vasquez admitted the factual allegations but asserted as one of several affirmative defenses that the Government's "dilatory processing" of her petition for remission or mitigation and "dilatory" commencement of the civil forfeiture action violated her right to due process. The District Court, after a 2-day bench trial held in January 1978, determined that the time which had elapsed was reasonable under the circumstances and therefore declared the currency forfeited under 31 U. S. C. § 1102.

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[6] The conviction on the felony count was subsequently reversed because court files were left in the jury room during deliberations. *United States* v. *Vasquez*, 597 F. 2d 192 (CA9 1979).

[7] On March 28, 1977, the Customs Service officially notified Vasquez that her petition had been denied.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 645 F. 2d 836 (1981). Proceeding from the premise that the Government must bring forfeiture actions promptly because seizures infringe upon property rights, the Court of Appeals concluded that the Government's 18-month delay in filing its forfeiture action was unjustified. The Court of Appeals specifically held that pending administrative or criminal investigations cannot justify the delay when the necessary elements for a forfeiture were established at the time of the seizure and when the claimant seeks a speedy resolution of the claim. The Court of Appeals likewise rejected the Government's argument that the claimant should be required to show that the delay prejudiced her ability to present a defense to the forfeiture action. As a remedy for the due process violation, the Court of Appeals ordered dismissal of the Government's forfeiture action.[8]

Since other Circuits have determined that pending criminal[9] or administrative[10] investigations and prejudice to the claimant[11] are relevant considerations in determining whether a delay in instituting forfeiture proceedings violates due process, we granted certiorari to resolve the conflict. 455 U. S. 1015 (1982). We reverse.

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[8] Because we find no violation of due process, we do not decide whether dismissal of the forfeiture action with prejudice would be an appropriate remedy for undue delay.

[9] *E. g., White* v. *Acree*, 594 F. 2d 1385 (CA10 1979).

[10] *E. g., United States* v. *Thirty-Six Thousand One Hundred & Twenty-Five Dollars in U. S. Currency*, 642 F. 2d 1211 (CA5), cert. denied, 454 U. S. 835 (1981) (aff'g 510 F. Supp. 303 (ED La. 1980)).

[11] *E. g., United States* v. *Various Pieces of Semiconductor Manufacturing Equipment*, 649 F. 2d 606 (CA8 1981); *United States* v. *One 1976 Mercedes 450 SLC*, 667 F. 2d 1171 (CA5 1982).

II

The due process issue presented here is a narrow one. Vasquez concedes that the Government could constitutionally seize her property without a prior hearing.[12] Nor does Vasquez challenge the sufficiency of the judicial hearing that was eventually held. She argues only that the Government's delay in filing a civil forfeiture proceeding violated her due process right to a hearing "'at a meaningful time,'" *Fuentes* v. *Shevin*, 407 U. S. 67, 80 (1972), quoting *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). Unlike the situation where due process requires a prior hearing, there is no obvious bright line dictating when a postseizure hearing must occur. Because our prior cases in this area have wrestled with whether due process requires a preseizure hearing, we have not previously determined when a postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time.[13]

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[12] The general rule, of course, is that absent an "extraordinary situation" a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified. *Boddie* v. *Connecticut*, 401 U. S. 371, 378–379 (1971). See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); cf. *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974). But we have previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974), the Court upheld a Puerto Rico statute modeled after a federal forfeiture statute, 21 U. S. C. § 881(a), which allowed Puerto Rican authorities to seize, without prior notice or hearing, a yacht suspected of importing marihuana. *Pearson Yacht* clearly indicates that due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture. Such a requirement would make customs processing entirely unworkable. The government interests found decisive in *Pearson Yacht* are equally present in this situation: the seizure serves important governmental purposes; a preseizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than self-motivated private parties.

The Government argues that there is no general due process requirement of prompt postseizure filing of a judicial forfeiture action. Rather, the Government urges that the standard for assessing the timeliness of the suit be the same as that employed for due process challenges to delay in instituting criminal prosecutions. As articulated in *United States* v. *Lovasco*, 431 U. S. 783 (1977), such claims can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges. The Government argues that in the absence of unfair conduct of this sort, the timeliness of the suit is controlled only by the applicable statute of limitations. Here, Congress has required the Government to institute forfeiture proceedings within five years. 19 U. S. C. § 1621 (1976 ed., Supp. V).

We reject the Government's suggestion that *Lovasco* provides the appropriate test for determining whether the delay violates the due process command. *Lovasco* recognized that the interests of the suspect and society are better served if, absent bad faith or extreme prejudice to the defendant, the prosecutor is allowed sufficient time to weigh and sift evidence to ensure that an indictment is well founded. While the value of allowing the Government time to pursue its investigation applies to the civil forfeiture situation as well as the criminal proceeding, a major distinction exists. A suspect who has not been indicted retains his liberty; a claimant whose property has been seized, however, has been entirely deprived of the use of the property.

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[13] In *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971), we construed a statute allowing customs officials to seize obscene material as requiring a postseizure filing within 14 days and completion of the hearing in an additional 60 days. That case interpreted the statute so as to avoid possible First Amendment problems of prior restraint. The case did not involve, and thus we had no occasion to address, the time restraints imposed by the Due Process Clause. Even if we were inclined to interpret the statutes here in such a way as to avoid any due process question, it would be impossible to read into the statutory scheme, as we did in *Thirty-seven Photographs*, a short statute of limitations, since 19 U. S. C. § 1621 (1976 ed., Supp. V) expressly allows the Government to bring a civil forfeiture proceeding within five years.

A more apt analogy is to a defendant's right to a speedy trial once an indictment or other formal process has issued. In that situation, the defendant no longer retains his complete liberty. Even if he is allowed to post bail, his liberty is subject to the conditions required by his bail agreement. In *Barker* v. *Wingo*, 407 U. S. 514 (1972), we developed a test to determine when Government delay has abridged the right to a speedy trial. The *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.*, at 530.

Of course, *Barker* dealt with the Sixth Amendment right to a speedy trial rather than the Fifth Amendment right against deprivation of property without due process of law. Nevertheless, the Fifth Amendment claim here—which challenges only the length of time between the seizure and the initiation of the forfeiture trial—mirrors the concern of undue delay encompassed in the right to a speedy trial. The *Barker* balancing inquiry provides an appropriate framework for determining whether the delay here violated the due process right to be heard at a meaningful time. We have often repeated the seminal statement from *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), that "due process is flexible and calls for such procedural protections as the particular situation demands." *E. g.*, *Schweiker* v. *McClure*, 456 U. S. 188, 200 (1982); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 14–15, n. 15 (1978). The flexible approach of *Barker*, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U. S., at 530, is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met. As we stressed in *Barker*, none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.[14]

III

In applying the *Barker* balancing test to this situation, the overarching factor is the length of the delay. As we said in *Barker*, the length of the delay "is to some extent a triggering mechanism." *Ibid.* Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case. Our inquiry is the constitutional one of due process; we are not establishing a statute of limitations. Obviously, short delays—of perhaps a month or so—need less justification than longer delays. We regard the delay here—some 18 months—as quite significant. Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden.

Closely related to the length of the delay is the reason the Government assigns to justify the delay. *Id.*, at 531. The Government must be allowed some time to decide whether to institute forfeiture proceedings. The customs official's decision to seize property is of necessity a hasty one. Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the money without formal proceedings. Cf. *Lovasco*, *supra*, at 791. Normally, investigating officials can make such a determination fairly quickly, so that this reason alone could only rarely justify a lengthy delay.

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[14] The deprivation in *Barker*—loss of liberty—may well be more grievous than the deprivation of one's use of property at issue here. Thus, the balance of the interests, which depends so heavily on the context of the particular situation, may differ from a situation involving the right to a speedy trial.

An important justification for delaying the initiation of forfeiture proceedings is to see whether the Secretary's decision on the petition for remission will obviate the need for judicial proceedings. This delay can favor both the claimant and the Government. Cf. *Barker*, *supra*, at 521; *Lovasco*, *supra*, at 794–795. In many cases, the Government's entitlement to the property is clear, and the claimant's only prospect for reacquiring the property is that the Secretary will favorably exercise his discretion and allow remission or mitigation. If the Government were forced to initiate judicial proceedings without regard to administrative proceedings, the claimant would lose this benefit. Further, administrative proceedings are less formal and expensive than judicial forfeiture proceedings. Given the great percentage of successful petitions, allowing the Government to wait for action on administrative petitions eliminates unnecessary and burdensome court proceedings. Finally, a system whereby the judicial proceeding occurs after administrative action spares litigants and the Government from the burden of simultaneously participating in two forums.[15]

The Government takes the extreme position, however, that a pending administrative petition should completely toll the requirement of filing a judicial proceeding. Nothing in the statutory scheme or in our cases supports this argument. A claimant need not waive his right to a prompt judicial hearing simply because he seeks the additional remedy of an administrative petition for mitigation.[16] Unreasonable delay in processing the administrative petition cannot justify prolonged seizure of his property without a judicial hearing. Rather, the pendency of an administrative petition is simply a weighty factor in the flexible balancing inquiry.

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[15] By regulation, the Secretary is not allowed to process any petition for remission or mitigation while a civil forfeiture proceeding is pending. 19 CFR § 171.2(a) (1982).

[16] Under the 1978 revisions to 19 CFR § 162.31(a), the Customs Service is now required to warn claimants that unless they agree to defer judicial forfeiture proceedings until completion of the administrative process, the case

Pending criminal proceedings present similar justifications for delay in instituting civil forfeiture proceedings. A prior or contemporaneous civil proceeding could substantially hamper the criminal proceeding, which—as here—may often include forfeiture as part of the sentence. A prior civil suit might serve to estop later criminal proceedings and may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution. Compare Federal Rule of Civil Procedure 26(b) with Federal Rule of Criminal Procedure 16. In some circumstances, a civil forfeiture proceeding would prejudice the claimant's ability to raise an inconsistent defense in a contemporaneous criminal proceeding. See, *e. g., United States* v. *U. S. Currency*, 626 F. 2d 11 (CA6 1980). Again, however, the pendency of criminal proceedings is only an element to be considered in determining whether delay is unreasonable. Although federal criminal proceedings are generally fairly rapid since the advent of the Speedy Trial Act of 1974, 18 U. S. C. §3161 *et seq.* (1976 ed. and Supp. V), the pendency of a trial does not automatically toll the time for instituting a forfeiture proceeding.

In this case the Government relies on both a pending petition for mitigation or remission and a pending criminal proceeding to justify the delay in filing civil forfeiture proceedings. During the initial seven months after the seizure the Customs Service was determining whether to grant the petition. This investigation required responses to inquiries to state, federal, and Canadian law enforcement officers. Such an investigation inherently is time consuming, and there is no

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will be referred promptly to the United States Attorney for institution of judicial proceedings, or summary forfeiture proceedings will be begun.

indication that it was not pursued with diligence. The Customs Service then referred the matter to the United States Attorney, who obtained criminal indictments within two months. Importantly, one count of the indictment sought forfeiture as part of the sentence. If the Government had prevailed, a civil forfeiture would have been rendered unnecessary. There is no evidence in the record that the Government was responsible for the slow pace of the criminal proceedings, which reached a verdict five months later. After the criminal trial ended, the Secretary of the Treasury made a final decision within three months to deny the petition, and the United States Attorney promptly filed a civil forfeiture proceeding.

We are impressed by the assessment made by the District Court that the Goverment had acted with all due speed. Indeed, in an oral colloquy during trial the District Judge commented:

> "I have been anxious to see in this case whether there has been a lot of dilitory *[sic]* conduct that the government has really not done what it should do in order to push this thing with all reasonable speed, and, frankly, I don't see any point in which the government has been lax.
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> "If I had found such, and I found it an unreasonable length of time, I would have been happy to so hold . . . .
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> "But, in view of the evidence here, I just cannot see any way in which this Court can say that the government has not pursued their claim in all reasonable diligence." App. 77.

In sum, the Government's diligent pursuit of pending administrative and criminal proceedings indicates strongly that the reasons for its delay in filing a civil forfeiture proceeding were substantial.

The third element to be considered in the due process balance is the claimant's assertion of the right to a judicial hearing. A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property. See *Slocum* v. *Mayberry*, 2 Wheat. 1, 10 (1817) (Marshall, C. J.). Less formally, the claimant could simply request that the Customs Service refer the matter to the United States Attorney. If the claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property. Vasquez did none of these things and only occasionally inquired about the result of the petition for mitigation or remission and asked that the Secretary reach a decision promptly. The failure to use these remedies can be taken as some indication that Vasquez did not desire an early judicial hearing.

The final element is whether the claimant has been prejudiced by the delay. The primary inquiry here is whether the delay has hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence. Such prejudice could be a weighty factor indicating that the delay was unreasonable. Here, Vasquez has never alleged or shown that the delay affected her ability to defend against the impropriety of the forfeiture on the merits. On the contrary, Vasquez conceded that the elements necessary for a forfeiture under § 1102(a) were present in her case.

IV

In this case, the balance of factors indicates that the Government's delay in instituting civil forfeiture proceedings was reasonable. Although the 18-month delay was a substantial period of time, it was justified by the Government's diligent efforts in processing the petition for mitigation or remission and in pursuing related criminal proceedings. Vasquez never indicated that she desired early commencement of a civil forfeiture proceeding, and she has not asserted or shown that the delay prejudiced her ability to defend against the forfeiture. Therefore, the claimant was not denied due process of law. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, dissenting.

The Fifth Amendment provides that no person shall be deprived of property without due process of law. In this case the claimant was deprived of her property on September 10, 1975.* No preseizure process of any kind was provided. The postseizure proceeding that, under the Court's view, satisfies the constitutional requirement was commenced on March 22, 1977, over 18 months later.

None of the various activities that various Government bureaucrats undertook before filing the civil forfeiture proceeding was required by the Constitution or by any statute. None of those activities made it impossible, or even arduous, for the Government to act promptly to establish its right to hold claimant's currency. In my opinion a rule that allows the Government to dispossess a citizen of her property for more than 18 months without her consent and without a hearing is a flagrant violation of the Fifth Amendment.

I respectfully dissent.

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*The property was not contraband; it was seized simply because claimant made a misstatement to a customs officer.

CARDWELL ET AL. *v.* TAYLOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1496. Decided May 23, 1983

The District Court denied relief in respondent's habeas corpus proceedings, holding that certain statements made by him and introduced in evidence against him in his Arizona murder trial were voluntary. Relying on *Dunaway* v. *New York*, 442 U. S. 200, which requires the exclusion of custodial statements following an arrest that violates the Fourth Amendment, unless the circumstances show the attenuation of the taint of the illegal arrest, the Court of Appeals reversed, holding that the District Court should have permitted respondent to argue the Fourth Amendment issue, and that the record established that his custodial statements were obtained in violation of *Dunaway*.

Held: Federal courts may not, on a state prisoner's habeas corpus petition, consider a claim that evidence obtained in violation of the Fourth Amendment should have been excluded at his trial, when the prisoner has had an opportunity for full and fair litigation of that claim in the state courts. *Stone* v. *Powell*, 428 U. S. 465. Thus, the Court of Appeals should not have considered the Fourth Amendment *Dunaway* issue, and on remand should only review the District Court's decision on the Fifth Amendment issue of the voluntariness of respondent's statements.

Certiorari granted; 692 F. 2d 765, reversed and remanded.

PER CURIAM.

The respondent, Louis Cuen Taylor, was convicted of 28 counts of first-degree murder arising out of a fire set in a hotel in 1970. He received a sentence of life imprisonment on each count. After the Arizona Supreme Court affirmed his convictions and sentences, *State* v. *Taylor*, 112 Ariz. 68, 537 P. 2d 938 (1975), cert. denied, 424 U. S. 921 (1976), he filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. The District Court denied the writ, and the Court of Appeals for the Ninth Circuit reversed, remanding for an evidentiary hearing to determine whether certain statements made by Taylor and introduced in evidence against him were voluntary.

579 F. 2d 1380 (1978). On remand, the District Court decided that the statements were voluntary and again denied the writ. On appeal, the Court of Appeals reversed once more. 692 F. 2d 765 (1982). It relied on *Dunaway* v. *New York*, 442 U. S. 200 (1979), decided after the first appeal to the Ninth Circuit but before the hearing on remand. In *Dunaway*, this Court required the exclusion of custodial statements following an arrest that violated the Fourth Amendment, unless the circumstances showed the attenuation of the taint of the illegal arrest. The Court of Appeals stated that the District Court "should have permitted the petitioner to argue the Fourth Amendment issue." App. to Pet. for Cert. 2a. Although the District Court had not considered the issue, the Court of Appeals thought the record sufficient to permit it to resolve the question. It determined that Taylor had been arrested without probable cause and that "[n]o significant event intervened" between the illegal arrest and the statements to attenuate the taint. *Id.*, at 3a. Consequently, it directed the District Court to issue the writ. We now reverse.

In *Stone* v. *Powell*, 428 U. S. 465 (1976), Powell, like the respondent in this case, argued that evidence used in his trial was the product of an illegal arrest. This Court held that federal courts could not, on a state prisoner's petition for a writ of habeas corpus, consider a claim that evidence obtained in violation of the Fourth Amendment should have been excluded at his trial, when the prisoner has had an opportunity for full and fair litigation of that claim in the state courts. The Court of Appeals in this case, however, did just that, holding that the custodial statements made by Taylor were obtained in violation of our decision in *Dunaway*. *Dunaway* relied not on the involuntariness of the statements made—a concern under the Fifth Amendment—but on whether there was an unattenuated causal link between the statements and a violation of the Fourth Amendment. Indeed, the Court in *Dunaway* sought to dispel any "lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established" for purposes of the Fourth Amendment. 442 U. S., at 219. Therefore, under *Stone* v. *Powell*, the Court of Appeals should not have considered the petitioner's argument that *Dunaway* required the exclusion of his statements. Only if the statements were involuntary, and therefore obtained in violation of the Fifth Amendment, could the federal courts grant relief on collateral review. On remand, the Court of Appeals should review the District Court's decision on voluntariness, giving appropriate deference, of course, to any findings of fact made by the state courts in the long course of these proceedings, *Sumner* v. *Mata*, 449 U. S. 539 (1981). The motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition and set the case for oral argument.

BOB JONES UNIVERSITY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-3. Argued October 12, 1982—Decided May 24, 1983*

Section 501(c)(3) of the Internal Revenue Code of 1954 (IRC) provides that "[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes" are entitled to tax exemption. Until 1970, the Internal Revenue Service (IRS) granted tax-exempt status under § 501(c)(3) to private schools, independent of racial admissions policies, and granted charitable deductions for contributions to such schools under § 170 of the IRC. But in 1970, the IRS concluded that it could no longer justify allowing tax-exempt status under § 501(c)(3) to private schools that practiced racial discrimination, and in 1971 issued Revenue Ruling 71-447 providing that a private school not having a racially nondiscriminatory policy as to students is not "charitable" within the common-law concepts reflected in §§ 170 and 501(c)(3). In No. 81-3, petitioner Bob Jones University, while permitting unmarried Negroes to enroll as students, denies admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating. Because of this admissions policy, the IRS revoked the University's tax-exempt status. After paying a portion of the federal unemployment taxes for a certain taxable year, the University filed a refund action in Federal District Court, and the Government counterclaimed for unpaid taxes for that and other taxable years. Holding that the IRS exceeded its powers in revoking the University's tax-exempt status and violated the University's rights under the Religion Clauses of the First Amendment, the District Court ordered the IRS to refund the taxes paid and rejected the counterclaim. The Court of Appeals reversed. In No. 81-1, petitioner Goldsboro Christian Schools maintains a racially discriminatory admissions policy based upon its interpretation of the Bible, accepting for the most part only Caucasian students. The IRS determined that Goldsboro was not an organization described in § 501(c)(3) and hence was required to pay federal social security and unemployment taxes. After paying a portion of such taxes for certain years, Goldsboro filed a refund suit in Federal District Court, and the IRS counterclaimed for unpaid taxes. The District Court entered summary judgment for

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*Together with No. 81-1, *Goldsboro Christian Schools, Inc.* v. *United States*, also on certiorari to the same court.

the IRS, rejecting Goldsboro's claim to tax-exempt status under § 501(c)(3) and also its claim that the denial of such status violated the Religion Clauses of the First Amendment. The Court of Appeals affirmed.

Held: Neither petitioner qualifies as a tax-exempt organization under § 501(c)(3). Pp. 585–605.

(a) An examination of the IRC's framework and the background of congressional purposes reveals unmistakable evidence that underlying all relevant parts of the IRC is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy. Thus, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest, and the institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. Pp. 585–592.

(b) The IRS's 1970 interpretation of § 501(c)(3) was correct. It would be wholly incompatible with the concepts underlying tax exemption to grant tax-exempt status to racially discriminatory private educational entities. Whatever may be the rationale for such private schools' policies, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the above "charitable" concept or within the congressional intent underlying § 501(c)(3). Pp. 592–596.

(c) The IRS did not exceed its authority when it announced its interpretation of § 501(c)(3) in 1970 and 1971. Such interpretation is wholly consistent with what Congress, the Executive, and the courts had previously declared. And the actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority. Pp. 596–602.

(d) The Government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. Petitioners' asserted interests cannot be accommodated with that compelling governmental interest, and no less restrictive means are available to achieve the govermental interest. Pp. 602–604.

(e) The IRS properly applied its policy to both petitioners. Goldsboro admits that it maintains racially discriminatory policies, and, contrary to Bob Jones University's contention that it is not racially discriminatory, discrimination on the basis of racial affiliation and association is a form of racial discrimination. P. 605.

No. 81-1, 644 F. 2d 879, and No. 81-3, 639 F. 2d 147, affirmed.

Burger, C. J., delivered the opinion of the Court, in which Brennan, White, Marshall, Blackmun, Stevens, and O'Connor, JJ., joined, and in Part III of which Powell, J., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 606. Rehnquist, J., filed a dissenting opinion, *post*, p. 612.

William G. McNairy argued the cause for petitioner in No. 81–1. With him on the briefs were *Claude C. Pierce*, *Edward C. Winslow*, and *John H. Small*. *William Bentley Ball* argued the cause for petitioner in No. 81–3. With him on the briefs were *Philip J. Murren* and *Richard E. Connell*.

Assistant Attorney General Reynolds argued the cause for the United States in both cases. With him on the briefs were *Acting Solicitor General Wallace* and *Deputy Assistant Attorney General Cooper*.

William T. Coleman, Jr., pro se, by invitation of the Court, 456 U. S. 922, argued the cause as *amicus curiae* urging affirmance. With him on the brief were *Richard C. Warmer*, *Donald T. Bliss*, *John W. Stamper*, *Ira M. Feinberg*, and *Eric Schnapper*.†

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†Briefs of *amici curiae* urging reversal in No. 81–3 were filed by *Earl W. Trent, Jr.*, and *John W. Baker* for the American Baptist Churches in the U. S. A. et al.; by *William H. Ellis* for the Center for Law and Religious Freedom of the Christian Legal Society; by *Forest D. Montgomery* for the National Association of Evangelicals; and by *Congressman Trent Lott, pro se*.

Briefs of *amici curiae* urging affirmance in both cases were filed by *Nadine Strossen*, *E. Richard Larson*, and *Samuel Rabinove* for the American Civil Liberties Union et al.; by *Harold P. Weinberger*, *Lawrence S. Robbins*, *Justin J. Finger*, *Jeffrey P. Sinensky*, and *David M. Raim* for the Anti-Defamation League of B'nai B'rith; by *John H. Pickering*, *William T. Lake*, and *Adam Yarmolinsky* for Independent Sector; by *Amy Young-Anawaty*, *David Carliner*, *Burt Neuborne*, and *Harry A. Inman* for the International Human Rights Law Group; by *Robert H. Kapp*, *Walter A. Smith, Jr.*, *Joseph M. Hassett*, *David S. Tatel*, *Richard C. Dinkelspiel*, *William L. Robinson*, *Norman J. Chachkin*, and *Frank R. Parker* for the Lawyers' Committee for Civil Rights Under Law; by *Thomas I. Atkins*,

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954.

I

A

Until 1970, the Internal Revenue Service granted tax-exempt status to private schools, without regard to their racial admissions policies, under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3),[1] and granted chari-

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J. Harold Flannery, and *Robert D. Goldstein* for the National Association for the Advancement of Colored People et al.; by *Leon Silverman*, *Linda R. Blumkin*, *Ann F. Thomas*, *Marla G. Simpson*, and *Jack Greenberg* for the NAACP Legal Defense and Educational Fund, Inc.; by *Harry K. Mansfield* for the National Association of Independent Schools; by *Charles E. Daye* for the North Carolina Association of Black Lawyers; by *Earle K. Moore* for the United Church of Christ; and by *Lawrence E. Lewy*, *pro se*.

Briefs of *amici curiae* in both cases were filed by *Martin B. Cowan* and *Dennis Rapps* for the National Jewish Commission on Law and Public Affairs; and by *Laurence H. Tribe*, *pro se*, and *Bernard Wolfman*, *pro se*.

[1] Section 501(c)(3) lists the following organizations, which, pursuant to § 501(a), are exempt from taxation unless denied tax exemptions under other specified sections of the Code:

"Corporations, and any community chest, fund, or foundation, *organized and operated exclusively for religious, charitable*, scientific, testing for public safety, literary, *or educational purposes*, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any table deductions for contributions to such schools under § 170 of the Code, 26 U. S. C. § 170.[2]

On January 12, 1970, a three-judge District Court for the District of Columbia issued a preliminary injunction prohibiting the IRS from according tax-exempt status to private schools in Mississippi that discriminated as to admissions on the basis of race. *Green* v. *Kennedy*, 309 F. Supp. 1127, appeal dism'd *sub nom. Cannon* v. *Green*, 398 U. S. 956 (1970). Thereafter, in July 1970, the IRS concluded that it could "no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination." IRS News Release, July 7, 1970, reprinted in App. in No. 81-3, p. A235. At the same time, the IRS announced that it could not "treat gifts to such schools as charitable deductions for income tax purposes [under § 170]." *Ibid.* By letter dated November 30, 1970, the IRS formally notified private schools, including those involved in this litigation, of this change in policy, "applicable to all private schools in the United States at all levels of education." See *id.*, at A232.

On June 30, 1971, the three-judge District Court issued its opinion on the merits of the Mississippi challenge. *Green* v. *Connally*, 330 F. Supp. 1150, summarily aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971). That court approved the IRS's amended construction of the Tax Code. The court also held that racially discriminatory private schools were not entitled to exemption under § 501(c)(3) and that donors were not entitled to deductions for contributions to such schools under § 170. The court permanently enjoined the Commissioner of

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political campaign on behalf of any candidate for public office." (Emphasis added.)

[2] Section 170(a) allows deductions for certain "charitable contributions." Section 170(c)(2)(B) includes within the definition of "charitable contribution" a contribution or gift to or for the use of a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ."

Internal Revenue from approving tax-exempt status for any school in Mississippi that did not publicly maintain a policy of nondiscrimination.

The revised policy on discrimination was formalized in Revenue Ruling 71-447, 1971-2 Cum. Bull. 230:

> "Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable, . . . or educational purposes' was intended to express the basic common law concept [of 'charity']. . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."

Based on the "national policy to discourage racial discrimination in education," the IRS ruled that "a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code." *Id.*, at 231.[3]

The application of the IRS construction of these provisions to petitioners, two private schools with racially discriminatory admissions policies, is now before us.

B

No. 81-3, Bob Jones University v. *United States*

Bob Jones University is a nonprofit corporation located in Greenville, S. C.[4] Its purpose is "to conduct an institution of learning . . . , giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures." Certificate of Incorporation, Bob Jones University, Inc., of Greenville, S. C., reprinted in App. in No. 81–3, p. A119. The corporation operates a school with an enrollment of approximately 5,000 students, from kindergarten through college and graduate school. Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.

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[3] Revenue Ruling 71-447, 1971-2 Cum. Bull. 230, defined "racially nondiscriminatory policy as to students" as meaning that

> "the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs."

[4] Bob Jones University was founded in Florida in 1927. It moved to Greenville, S. C., in 1940, and has been incorporated as an eleemosynary institution in South Carolina since 1952.

The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes,[5] but did accept applications from Negroes married within their race.

Following the decision of the United States Court of Appeals for the Fourth Circuit in *McCrary* v. *Runyon*, 515 F. 2d 1082 (1975), aff'd, 427 U. S. 160 (1976), prohibiting racial exclusion from private schools, the University revised its policy. Since May 29, 1975, the University has permitted unmarried Negroes to enroll; but a disciplinary rule prohibits interracial dating and marriage. That rule reads:

> "*There is to be no interracial dating.*
>
> "1. Students who are partners in an interracial marriage will be expelled.

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[5] Beginning in 1973, Bob Jones University instituted an exception to this rule, allowing applications from unmarried Negroes who had been members of the University staff for four years or more.

> "2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
>
> "3. Students who date outside of their own race will be expelled.
>
> "4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled." App. in No. 81–3, p. A197.

The University continues to deny admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating. *Id.*, at A277.

Until 1970, the IRS extended tax-exempt status to Bob Jones University under § 501(c)(3). By the letter of November 30, 1970, that followed the injunction issued in *Green* v. *Kennedy*, 309 F. Supp. 1127 (DC 1970), the IRS formally notified the University of the change in IRS policy, and announced its intention to challenge the tax-exempt status of private schools practicing racial discrimination in their admissions policies.

After failing to obtain an assurance of tax exemption through administrative means, the University instituted an action in 1971 seeking to enjoin the IRS from revoking the school's tax-exempt status. That suit culminated in *Bob Jones University* v. *Simon*, 416 U. S. 725 (1974), in which this Court held that the Anti-Injunction Act of the Internal Revenue Code, 26 U. S. C. § 7421(a), prohibited the University from obtaining judicial review by way of injunctive action before the assessment or collection of any tax.

Thereafter, on April 16, 1975, the IRS notified the University of the proposed revocation of its tax-exempt status. On January 19, 1976, the IRS officially revoked the University's tax-exempt status, effective as of December 1, 1970, the day after the University was formally notified of the change in IRS policy. The University subsequently filed returns under the Federal Unemployment Tax Act for the period from December 1, 1970, to December 31, 1975, and paid a tax totalling $21 on one employee for the calendar year of 1975. After its request for a refund was denied, the University instituted the present action, seeking to recover the $21 it had paid to the IRS. The Government counterclaimed for unpaid federal unemployment taxes for the taxable years 1971 through 1975, in the amount of $489,675.59, plus interest.

The United States District Court for the District of South Carolina held that revocation of the University's tax-exempt status exceeded the delegated powers of the IRS, was improper under the IRS rulings and procedures, and violated the University's rights under the Religion Clauses of the First Amendment. 468 F. Supp. 890, 907 (1978). The court accordingly ordered the IRS to pay the University the $21 refund it claimed and rejected the IRS's counterclaim.

The Court of Appeals for the Fourth Circuit, in a divided opinion, reversed. 639 F. 2d 147 (1980). Citing *Green* v. *Connally*, 330 F. Supp. 1150 (DC 1971), with approval, the Court of Appeals concluded that § 501(c)(3) must be read against the background of charitable trust law. To be eligible for an exemption under that section, an institution must be "charitable" in the common-law sense, and therefore must not be contrary to public policy. In the court's view, Bob Jones University did not meet this requirement, since its "racial policies violated the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private." 639 F. 2d, at 151. The court held that the IRS acted within its statutory authority in revoking the University's tax-exempt status. Finally, the Court of Appeals rejected petitioner's arguments that the revocation of the tax exemption violated the Free Exercise and Establishment Clauses of the First Amendment. The case was remanded to the District Court with instructions to dismiss the University's claim for a refund and to reinstate the IRS's counterclaim.

C

No. 81-1, Goldsboro Christian Schools, Inc. v. United States

Goldsboro Christian Schools is a nonprofit corporation located in Goldsboro, N. C. Like Bob Jones University, it was established "to conduct an institution or institutions of learning . . . , giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures." Articles of Incorporation ¶ 3(a); see Complaint ¶ 6, reprinted in App. in No. 81-1, pp. 5-6. The school offers classes from kindergarten through high school, and since at least 1969 has satisfied the State of North Carolina's requirements for secular education in private schools. The school requires its high school students to take Bible-related courses, and begins each class with prayer.

Since its incorporation in 1963, Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based upon its interpretation of the Bible.[6] Goldsboro has for the most part accepted only Caucasians. On occasion, however, the school has accepted children from racially mixed marriages in which one of the parents is Caucasian.

Goldsboro never received a determination by the IRS that it was an organization entitled to tax exemption under § 501(c)(3). Upon audit of Goldsboro's records for the years 1969 through 1972, the IRS determined that Goldsboro was not an organization described in § 501(c)(3), and therefore was required to pay taxes under the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

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[6] According to the interpretation espoused by Goldsboro, race is determined by descendance from one of Noah's three sons—Ham, Shem, and Japheth. Based on this interpretation, Orientals and Negroes are Hamitic, Hebrews are Shemitic, and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God's command. App. in No. 81-1, pp. 40-41.

Goldsboro paid the IRS $3,459.93 in withholding, social security, and unemployment taxes with respect to one employee for the years 1969 through 1972. Thereafter, Goldsboro filed a suit seeking refund of that payment, claiming that the school had been improperly denied § 501(c)(3) exempt status.[7] The IRS counterclaimed for $160,073.96 in unpaid social security and unemployment taxes for the years 1969 through 1972, including interest and penalties.[8]

The District Court for the Eastern District of North Carolina decided the action on cross-motions for summary judgment. 436 F. Supp. 1314 (1977). In addressing the motions for summary judgment, the court assumed that Goldsboro's racially discriminatory admissions policy was based upon a sincerely held religious belief. The court nevertheless rejected Goldsboro's claim to tax-exempt status under § 501(c)(3), finding that "private schools maintaining racially discriminatory admissions policies violate clearly declared federal policy and, therefore, must be denied the federal tax benefits flowing from qualification under Section 501(c)(3)." *Id.*, at 1318. The court also rejected Goldsboro's arguments that denial of tax-exempt status violated the Free Exercise and Establishment Clauses of the First Amendment. Accordingly, the court entered summary judgment for the IRS on its counterclaim.

The Court of Appeals for the Fourth Circuit affirmed, 644 F. 2d 879 (1981) *(per curiam)*. That court found an "identity for present purposes" between the *Goldsboro* case and the *Bob Jones University* case, which had been decided shortly before by another panel of that court, and affirmed for the reasons set forth in *Bob Jones University*.

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[7] Goldsboro also asserted that it was not obliged to pay taxes on lodging furnished to its teachers. It does not ask this Court to review the rejection of that claim.

[8] By stipulation, the IRS agreed to abate its assessment for 1969 and most of 1970 to reflect the fact that the IRS did not begin enforcing its policy of denying tax-exempt status to racially discriminatory private schools until November 30, 1970. As a result, the amount of the counterclaim was reduced to $116,190.99. *Id.*, at 104, 110.

We granted certiorari in both cases, 454 U. S. 892 (1981),[9] and we affirm in each.

II

A

In Revenue Ruling 71–447, the IRS formalized the policy, first announced in 1970, that § 170 and § 501(c)(3) embrace the common-law "charity" concept. Under that view, to qualify for a tax exemption pursuant to § 501(c)(3), an institution must show, first, that it falls within one of the eight categories expressly set forth in that section, and second, that its activity is not contrary to settled public policy.

Section 501(c)(3) provides that "[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes" are entitled to tax exemption. Petitioners argue that the plain language of the statute guarantees them tax-exempt status. They emphasize the absence of any language in the statute expressly requiring all exempt organizations to be "charitable" in the common-law sense, and they contend that the disjunctive "or" separating the categories in § 501(c)(3) precludes such a reading. Instead, they argue that if an institution falls within one or more of the specified categories it is automatically entitled to exemption, without regard to whether it also qualifies as "charitable." The Court of Appeals rejected that contention and concluded that petitioners' interpretation of the statute "tears section 501(c)(3) from its roots." 639 F. 2d, at 151.

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[9] After the Court granted certiorari, the Government filed a motion to dismiss, informing the Court that the Department of the Treasury intended to revoke Revenue Ruling 71–447 and other pertinent rulings and to recognize § 501(c)(3) exemptions for petitioners. The Government suggested that these actions were therefore moot. Before this Court ruled on that motion, however, the United States Court of Appeals for the District of Columbia Circuit enjoined the Government from granting § 501(c)(3) tax-exempt status to any school that discriminates on the basis of race. *Wright* v. *Regan*, No. 80–1124 (Feb. 18, 1982) (*per curiam* order). Thereafter, the Government informed the Court that it would not revoke the Revenue Rulings and withdrew its request that the actions be dismissed as moot. The Government continues to assert that the IRS lacked authority to promulgate Revenue Ruling 71–447, and does not defend that aspect of the rulings below.

It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:

> "The general words used in the clause . . . , taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law. . . .*" *Brown* v. *Duchesne*, 19 How. 183, 194 (1857) (emphasis added).

Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.

This "charitable" concept appears explicitly in § 170 of the Code. That section contains a list of organizations virtually identical to that contained in § 501(c)(3). It is apparent that Congress intended that list to have the same meaning in both sections.[10] In § 170, Congress used the list of organizations in defining the term "charitable contributions." On its face, therefore, § 170 reveals that Congress' intention was to provide tax benefits to organizations serving charitable purposes.[11] The form of § 170 simply makes plain what common sense and history tell us: in enacting both § 170 and

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[10] The predecessor of § 170 originally was enacted in 1917, as part of the War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330, whereas the predecessor of § 501(c)(3) dates back to the income tax law of 1894, Act of Aug. 27, 1894, ch. 349, 28 Stat. 509, see n. 14, *infra*. There are minor differences between the lists of organizations in the two sections, see generally Liles & Blum, Development of the Federal Tax Treatment of Charities, 39 Law & Contemp. Prob. 6, 24–25 (No. 4, 1975) (hereinafter Liles & Blum). Nevertheless, the two sections are closely related; both seek to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits. The language of the two sections is in most respects identical, and the Commissioner and the courts consistently have applied many of the same standards in interpreting those sections. See 5 J. Mertens, Law of Federal Income Taxation § 31.12 (1980); 6 *id.*, §§ 34.01–34.13 (1975); B. Bittker & L. Stone, Federal Income Taxation 220–222 (5th ed. 1980). To the extent that § 170 "aids in ascertaining the meaning" of § 501(c)(3), therefore, it is "entitled to great weight," *United States* v. *Stewart*, 311 U. S. 60, 64–65 (1940). See *Harris* v. *Commissioner*, 340 U. S. 106, 107 (1950).

[11] The dissent suggests that the Court "quite adeptly avoids the statute it is construing," *post*, at 612, and "seeks refuge . . . by turning to § 170," *post*, at 613. This assertion dissolves when one sees that § 501(c)(3) and § 170 are construed together, as they must be. The dissent acknowledges that the two sections are "mirror" provisions; surely there can be no doubt that the Court properly looks to § 170 to determine the meaning of § 501(c)(3). It is also suggested that § 170 is "at best of little usefulness in finding the meaning of § 501(c)(3)," since "§ 170(c) simply tracks the requirements set forth in § 501(c)(3)," *post*, at 614. That reading loses sight of the fact that § 170(c) defines the term "charitable contribution." The plain language of § 170 reveals that Congress' objective was to employ tax exemptions and deductions to promote certain *charitable* purposes. While the eight categories of institutions specified in the statute are indeed presumptively charitable in nature, the IRS properly considered principles of charitable trust law in determining whether the institutions in question may truly be considered "charitable" for purposes of entitlement to the tax benefits conferred by § 170 and § 501(c)(3).

§ 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.

Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England. The origins of such exemptions lie in the special privileges that have long been extended to charitable trusts.[12]

More than a century ago, this Court announced the caveat that is critical in this case:

> "[I]t has now become an established principle of American law, that courts of chancery will sustain and protect . . . a gift . . . to public charitable uses, *provided the same is consistent with local laws and public policy*. . . ." *Perin* v. *Carey*, 24 How. 465, 501 (1861) (emphasis added).

Soon after that, in 1877, the Court commented:

> "A charitable use, *where neither law nor public policy forbids*, may be applied to almost any thing *that tends to promote the well-doing and well-being of social man*." *Ould* v. *Washington Hospital for Foundlings*, 95 U. S. 303, 311 (emphasis added).

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[12] The form and history of the charitable exemption and deduction sections of the various income tax Acts reveal that Congress was guided by the common law of charitable trusts. See Simon, The Tax-Exempt Status of Racially Discriminatory Religious Schools, 36 Tax L. Rev. 477, 485–489 (1981) (hereinafter Simon). Congress acknowledged as much in 1969. The House Report on the Tax Reform Act of 1969, Pub. L. 91–172, 83 Stat. 487, stated that the § 501(c)(3) exemption was available only to institutions that served "the specified charitable purposes," H. R. Rep. No. 91–413, pt. 1, p. 35 (1969), and described "charitable" as "a term that has been used in the law of trusts for hundreds of years." *Id.*, at 43. We need not consider whether Congress intended to incorporate into the Internal Revenue Code any aspects of charitable trust law other than the requirements of public benefit and a valid public purpose.

See also, *e. g., Jackson* v. *Phillips*, 96 Mass. 539, 556 (1867). In 1891, in a restatement of the English law of charity[13] which has long been recognized as a leading authority in this country, Lord MacNaghten stated:

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; *trusts for the advancement of education;* trusts for the advancement of religion; and trusts for *other purposes beneficial to the community,* not falling under any of the preceding heads." *Commissioners* v. *Pemsel*, [1891] A. C. 531, 583 (emphasis added).

See, *e. g.*, 4 A. Scott, Law of Trusts § 368, pp. 2853–2854 (3d ed. 1967) (hereinafter Scott). These statements clearly reveal the legal background against which Congress enacted the first charitable exemption statute in 1894:[14] charities were to be given preferential treatment because they provide a benefit to society.

What little floor debate occurred on the charitable exemption provision of the 1894 Act and similar sections of later statutes leaves no doubt that Congress deemed the specified organizations entitled to tax benefits because they served desirable public purposes. See, *e. g.*, 26 Cong. Rec. 585–586

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[13] The draftsmen of the 1894 income tax law, which included the first charitable exemption provision, relied heavily on English concepts of taxation; and the list of exempt organizations appears to have been patterned upon English income tax statutes. See 26 Cong. Rec. 584–588, 6612–6615 (1894).

[14] Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 556–557. The income tax system contained in the 1894 Act was declared unconstitutional, *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601 (1895), for reasons unrelated to the charitable exemption provision. The terms of that exemption were in substance included in the corporate income tax contained in the Payne-Aldrich Tariff Act of 1909, ch. 6, § 38, 36 Stat. 112. A similar exemption has been included in every income tax Act since the adoption of the Sixteenth Amendment, beginning with the Revenue Act of 1913, ch. 16, § II(G), 38 Stat. 172. See generally Reiling, Federal Taxation: What Is a Charitable Organization?, 44 A. B. A. J. 525 (1958); Liles & Blum.

(1894); *id.*, at 1727. In floor debate on a similar provision in 1917, for example, Senator Hollis articulated the rationale:

> "For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent." 55 Cong. Rec. 6728.

See also, *e. g.*, 44 Cong. Rec. 4150 (1909); 50 Cong. Rec. 1305–1306 (1913). In 1924, this Court restated the common understanding of the charitable exemption provision:

> "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." *Trinidad* v. *Sagrada Orden*, 263 U. S. 578, 581.[15]

In enacting the Revenue Act of 1938, ch. 289, 52 Stat. 447, Congress expressly reconfirmed this view with respect to the charitable deduction provision:

> "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare." H. R. Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938).[16]

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[15] That same year, the Bureau of Internal Revenue expressed a similar view of the charitable deduction section of the estate tax contained in the Revenue Act of 1918, ch. 18, § 403(a)(3), 40 Stat. 1098. The Solicitor of Internal Revenue looked to the common law of charitable trusts in construing that provision, and noted that "generally bequests for the benefit and advantage of the general public are valid as charities." Sol. Op. 159, III-1 Cum. Bull. 480, 482 (1924).

[16] The common-law requirement of public benefit is universally recognized by commentators on the law of trusts. For example, the Bogerts state:

"In return for the favorable treatment accorded charitable gifts which imply some disadvantage to the community, the courts must find in the

A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy. In 1861, this Court stated that a public charitable use must be "consistent with local laws and public policy," *Perin* v. *Carey*, 24 How., at 501. Modern commentators and courts have echoed that view. See, *e. g.*, Restatement (Second) of Trusts § 377, Comment *c* (1959); 4 Scott § 377, and cases cited therein; Bogert § 378, at 191–192.[17]

When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.[18] History but-

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trust which is to be deemed 'charitable' some real advantages to the public which more than offset the disadvantages arising out of special privileges accorded charitable trusts." G. Bogert & G. Bogert, Law of Trusts and Trustees § 361, p. 3 (rev. 2d ed. 1977) (hereinafter Bogert).

For other statements of this principle, see, *e. g.*, 4 Scott § 348, at 2770; Restatement (Second) of Trusts § 368, Comment *b* (1959); E. Fisch, D. Freed, & E. Schachter, Charities and Charitable Foundations § 256 (1974).

[17] Cf. *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30, 35 (1958), in which this Court referred to "the presumption against congressional intent to encourage violation of declared public policy" in upholding the Commissioner's disallowance of deductions claimed by a trucking company for fines it paid for violations of state maximum weight laws.

[18] The dissent acknowledges that "Congress intended . . . to offer a tax benefit to organizations . . . providing a public benefit," *post*, at 614–615, but suggests that Congress itself fully defined what organizations provide a public benefit, through the list of eight categories of exempt organizations contained in § 170 and § 501(c)(3). Under that view, any nonprofit organization that falls within one of the specified categories is automatically entitled to the tax benefits, provided it does not engage in expressly

tresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest.[19] The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.

B

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of

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prohibited lobbying or political activities. *Post*, at 617. The dissent thus would have us conclude, for example, that any nonprofit organization that does not engage in prohibited lobbying activities is entitled to tax exemption as an "educational" institution if it is organized for the " 'instruction or training of the individual for the purpose of improving or developing his capabilities,' " 26 CFR § 1.501(c)(3)-1(d)(3) (1982). See *post*, at 623. As Judge Leventhal noted in *Green* v. *Connally*, 330 F. Supp. 1150, 1160 (DC), summarily aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971), Fagin's school for educating English boys in the art of picking pockets would be an "educational" institution under that definition. Similarly, a band of former military personnel might well set up a school for intensive training of subversives for guerrilla warfare and terrorism in other countries; in the abstract, that "school" would qualify as an "educational" institution. Surely Congress had no thought of affording such an unthinking, wooden meaning to § 170 and § 501(c)(3) as to provide tax benefits to "educational" organizations that do not serve a public, charitable purpose.

[19] The Court's reading of § 501(c)(3) does not render meaningless Congress' action in specifying the eight categories of presumptively exempt organizations, as petitioners suggest. See Brief for Petitioner in No. 81-1, pp. 18-24. To be entitled to tax-exempt status under § 501(c)(3), an organization must first fall within one of the categories specified by Congress, and in addition must serve a valid charitable purpose.

Plessy v. *Ferguson*, 163 U. S. 537 (1896); racial segregation in primary and secondary education prevailed in many parts of the country. See, *e. g.*, Segregation and the Fourteenth Amendment in the States (B. Reams & P. Wilson eds. 1975).[20] This Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), signalled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following *Brown* v. *Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

> "The right of a student not to be segregated on racial grounds in schools . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958).

In *Norwood* v. *Harrison*, 413 U. S. 455, 468–469 (1973), we dealt with a nonpublic institution:

> "[A] private school—even one that discriminates—fulfills an important educational function; *however, . . . [that] legitimate educational function cannot be isolated from*

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[20] In 1894, when the first charitable exemption provision was enacted, racially segregated educational institutions would not have been regarded as against public policy. Yet contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to the charitable tax exemption. In *Walz* v. *Tax Comm'n*, 397 U. S. 664, 673 (1970), we observed:

"Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption."

Charitable trust law also makes clear that the definition of "charity" depends upon contemporary standards. See, *e. g.*, Restatement (Second) of Trusts § 374, Comment *a* (1959); Bogert § 369, at 65–67; 4 Scott § 368, at 2855–2856.

> *discriminatory practices . . . . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process.*" (Emphasis added.)

See also *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *Griffin* v. *County School Board*, 377 U. S. 218 (1964).

Congress, in Titles IV and VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 42 U. S. C. §§2000c, 2000c-6, 2000d, clearly expressed its agreement that racial discrimination in education violates a fundamental public policy. Other sections of that Act, and numerous enactments since then, testify to the public policy against racial discrimination. See, *e. g.*, the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 42 U. S. C. §1973 *et seq.* (1976 ed. and Supp. V); Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, 42 U. S. C. §3601 *et seq.* (1976 ed. and Supp. V); the Emergency School Aid Act of 1972, Pub. L. 92-318, 86 Stat. 354 (repealed effective Sept. 30, 1979; replaced by similar provisions in the Emergency School Aid Act of 1978, Pub. L. 95-561, 92 Stat. 2252, 20 U. S. C. §§3191-3207 (1976 ed., Supp. V)).

The Executive Branch has consistently placed its support behind eradication of racial discrimination. Several years before this Court's decision in *Brown* v. *Board of Education*, *supra*, President Truman issued Executive Orders prohibiting racial discrimination in federal employment decisions, Exec. Order No. 9980, 3 CFR 720 (1943-1948 Comp.), and in classifications for the Selective Service, Exec. Order No. 9988, 3 CFR 726, 729 (1943-1948 Comp.). In 1957, President Eisenhower employed military forces to ensure compliance with federal standards in school desegregation programs. Exec. Order No. 10730, 3 CFR 389 (1954-1958 Comp.). And in 1962, President Kennedy announced:

> "[T]he granting of Federal assistance for . . . housing and related facilities from which Americans are excluded because of their race, color, creed, or national origin is unfair, unjust, and inconsistent with the public policy of

> the United States as manifested in its Constitution and laws." Exec. Order No. 11063, 3 CFR 652 (1959–1963 Comp.).

These are but a few of numerous Executive Orders over the past three decades demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination. See, *e. g.*, Exec. Order No. 11197, 3 CFR 278 (1964–1965 Comp.); Exec. Order No. 11478, 3 CFR 803 (1966–1970 Comp.); Exec. Order No. 11764, 3 CFR 849 (1971–1975 Comp.); Exec. Order No. 12250, 3 CFR 298 (1981).

Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," *Walz* v. *Tax Comm'n*, 397 U. S. 664, 673 (1970), or should be encouraged by having all taxpayers share in their support by way of special tax status.

There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct. That it may be seen as belated does not undermine its soundness. It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, which "exer[t] a pervasive influence on the entire educational process." *Norwood* v. *Harrison*, *supra*, at 469. Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the "charitable" concept discussed earlier, or within the congressional intent underlying § 170 and § 501(c)(3).[21]

C

Petitioners contend that, regardless of whether the IRS properly concluded that racially discriminatory private schools violate public policy, only Congress can alter the scope of § 170 and § 501(c)(3). Petitioners accordingly argue that the IRS overstepped its lawful bounds in issuing its 1970 and 1971 rulings.

Yet ever since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. Indeed as early as 1918, Congress expressly authorized the Commissioner "to make all needful rules and regulations for the enforcement" of the tax laws. Revenue Act of 1918, ch. 18, § 1309, 40 Stat. 1143. The same provision, so essential to efficient and fair administration of the tax laws, has appeared in Tax Codes ever since, see 26 U. S. C. § 7805(a); and this Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code, see, *e. g.*, *Commissioner* v. *Portland Cement Co. of Utah*, 450 U. S. 156, 169 (1981); *United States* v. *Correll*, 389 U. S. 299, 306–307 (1967); *Boske* v. *Comingore*, 177 U. S. 459, 469–470 (1900).

Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility for construing the Code falls to the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will. Administrators, like judges, are under oath to do so.

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[21] In view of our conclusion that racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public, we need not decide whether an organization providing a public benefit and otherwise meeting the requirements of § 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy.

In § 170 and § 501(c)(3), Congress has identified categories of traditionally exempt institutions and has specified certain additional requirements for tax exemption. Yet the need for continuing interpretation of those statutes is unavoidable. For more than 60 years, the IRS and its predecessors have constantly been called upon to interpret these and comparable provisions, and in doing so have referred consistently to principles of charitable trust law. In Treas. Regs. 45, Art. 517(1) (1921), for example, the IRS's predecessor denied charitable exemptions on the basis of proscribed political activity before the Congress itself added such conduct as a disqualifying element. In other instances, the IRS has denied charitable exemptions to otherwise qualified entities because they served too limited a class of people and thus did not provide a truly "public" benefit under the common-law test. See, *e. g., Crellin* v. *Commissioner*, 46 B. T. A. 1152, 1155–1156 (1942); *James Sprunt Benevolent Trust* v. *Commissioner*, 20 B. T. A. 19, 24–25 (1930). See also Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii) (1959). Some years before the issuance of the rulings challenged in these cases, the IRS also ruled that contributions to community recreational facilities would not be deductible and that the facilities themselves would not be entitled to tax-exempt status, unless those facilities were open to all on a racially nondiscriminatory basis. See Rev. Rul. 67–325, 1967–2 Cum. Bull. 113. These rulings reflect the Commissioner's continuing duty to interpret and apply the Internal Revenue Code. See also *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326, 337–338 (1941).

Guided, of course, by the Code, the IRS has the responsibility, in the first instance, to determine whether a particular entity is "charitable" for purposes of § 170 and § 501(c)(3).[22] This in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of "charitable" status. We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy.

On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. The correctness of the Commissioner's conclusion that a racially discriminatory private school "is not 'charitable' within the common law concepts reflected in . . . the Code," Rev. Rul. 71-447, 1971-2 Cum. Bull., at 231, is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970. Indeed, it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.[23] Clearly an educational institution engaging in practices affirmatively at odds with this declared position of the whole Government cannot be seen as exercising a "beneficial and stabilizing influenc[e] in community life," *Walz* v. *Tax Comm'n*, 397 U. S., at 673, and is not "charitable," within the meaning of § 170 and § 501(c)(3). We therefore hold that the IRS did not exceed its authority when it announced its interpretation of § 170 and § 501(c)(3) in 1970 and 1971.[24]

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[22] In the present case, the IRS issued its rulings denying exemptions to racially discriminatory schools only after a three-judge District Court had issued a preliminary injunction. See *supra*, at 578-579.

[23] JUSTICE POWELL misreads the Court's opinion when he suggests that the Court implies that "the Internal Revenue Service is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions," *post*, at 611. The Court's opinion does not warrant that interpretation. JUSTICE POWELL concedes that "if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education." *Post*, at 607. Since that policy is sufficiently clear to warrant JUSTICE POWELL's concession and for him to support our finding of longstanding congressional acquiescence, it should be apparent that his concerns about the Court's opinion are unfounded.

D

The actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority. It is, of course, not unknown for independent agencies or the Executive Branch to misconstrue the intent of a statute; Congress can and often does correct such misconceptions, if the courts have not done so. Yet for a dozen years Congress has been made aware—acutely aware—of the IRS rulings of 1970 and 1971. As we noted earlier, few issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

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[24] Many of the *amici curiae*, including *amicus* William T. Coleman, Jr. (appointed by the Court), argue that denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the Fifth Amendment. In light of our resolution of this litigation, we do not reach that issue. See, *e. g.*, *United States* v. *Clark*, 445 U. S. 23, 27 (1980); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 504 (1979).

Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation. See, *e. g.*, *Aaron* v. *SEC*, 446 U. S. 680, 694, n. 11 (1980). We have observed that "unsuccessful attempts at legislation are not the best of guides to legislative intent," *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 382, n. 11 (1969). Here, however, we do not have an ordinary claim of legislative acquiescence. Only one month after the IRS announced its position in 1970, Congress held its first hearings on this precise issue. Equal Educational Opportunity: Hearings before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., 1991 (1970). Exhaustive hearings have been held on the issue at various times since then. These include hearings in February 1982, after we granted review in this case. Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing before the House Committee on Ways and Means, 97th Cong., 2d Sess. (1982).

Nonaction by Congress is not often a useful guide, but the nonaction here is significant. During the past 12 years there have been no fewer than 13 bills introduced to overturn the IRS interpretation of § 501(c)(3).[25] Not one of these bills has emerged from any committee, although Congress has enacted numerous other amendments to § 501 during this same period, including an amendment to § 501(c)(3) itself. Tax Reform Act of 1976, Pub. L. 94-455, § 1313(a), 90 Stat. 1730. It is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971. See, *e. g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379–382 (1982); *Haig* v. *Agee*, 453 U. S. 280, 300–301 (1981); *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 384–386 (1983); *United States* v. *Rutherford*, 442 U. S. 544, 554, n. 10 (1979).

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[25] H. R. 1096, 97th Cong., 1st Sess. (1981); H. R. 802, 97th Cong., 1st Sess. (1981); H. R. 498, 97th Cong., 1st Sess. (1981); H. R. 332, 97th Cong., 1st Sess. (1981); H. R. 95, 97th Cong., 1st Sess. (1981); S. 995, 96th Cong., 1st Sess. (1979); H. R. 1905, 96th Cong., 1st Sess. (1979); H. R. 96, 96th Cong., 1st Sess. (1979); H. R. 3225, 94th Cong., 1st Sess. (1975); H. R. 1394, 93d Cong., 1st Sess. (1973); H. R. 5350, 92d Cong., 1st Sess. (1971); H. R. 2352, 92d Cong., 1st Sess. (1971); H. R. 68, 92d Cong., 1st Sess. (1971).

The evidence of congressional approval of the policy embodied in Revenue Ruling 71–447 goes well beyond the failure of Congress to act on legislative proposals. Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code, Act of Oct. 20, 1976, Pub. L. 94–568, 90 Stat. 2697. That provision denies tax-exempt status to social clubs whose charters or policy statements provide for "discrimination against any person on the basis of race, color, or religion."[26] Both the House and Senate Committee Reports on that bill articulated the national policy against granting tax exemptions to racially discriminatory private clubs. S. Rep. No. 94–1318, p. 8 (1976); H. R. Rep. No. 94–1353, p. 8 (1976).

Even more significant is the fact that both Reports focus on this Court's affirmance of *Green* v. *Connally*, 330 F. Supp. 50 (DC 1971), as having established that "discrimination on account of race is inconsistent with an *educational institution's* tax-exempt status." S. Rep. No. 94–1318, *supra*, at 7–8, and n. 5; H. R. Rep. No. 94–1353, *supra*, at 8, and n. 5 (emphasis added). These references in congressional Committee Reports on an enactment denying tax exemptions to racially discriminatory private social clubs cannot be read other than as indicating approval of the standards applied to racially discriminatory private schools by the IRS subsequent to 1970, and specifically of Revenue Ruling 71–447.[27]

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[26] Prior to the introduction of this legislation, a three-judge District Court had held that segregated social clubs were entitled to tax exemptions. *McGlotten* v. *Connally*, 338 F. Supp. 448 (DC 1972). Section 501(i) was enacted primarily in response to that decision. See S. Rep. No. 94–1318, pp. 7–8 (1976); H. R. Rep. No. 94–1353, p. 8 (1976).

III

Petitioners contend that, even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs.[28]

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[27] Reliance is placed on scattered statements in floor debate by Congressmen critical of the IRS's adoption of Revenue Ruling 71–447. See, *e. g.*, Brief for Petitioner in No. 81-1, pp. 27–28. Those views did not prevail. That several Congressmen, expressing their individual views, argued that the IRS had no authority to take the action in question, is hardly a balance for the overwhelming evidence of congressional awareness of and acquiescence in the IRS rulings of 1970 and 1971. Petitioners also argue that the Ashbrook and Dornan Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. 96–74, §§ 103, 614, 615, 93 Stat. 559, 562, 576–577, reflect congressional opposition to the IRS policy formalized in Revenue Ruling 71–447. Those amendments, however, are directly concerned only with limiting more aggressive enforcement procedures proposed by the IRS in 1978 and 1979 and preventing the adoption of more stringent substantive standards. The Ashbrook Amendment, § 103 of the Act, applies only to procedures, guidelines, or measures adopted after August 22, 1978, and thus in no way affects the status of Revenue Ruling 71–447. In fact, both Congressman Dornan and Congressman Ashbrook explicitly stated that their amendments would have no effect on prior IRS policy, including Revenue Ruling 71–447, see 125 Cong. Rec. 18815 (1979) (Cong. Dornan: "[M]y amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71–447. . . ."); *id.*, at 18446 (Cong. Ashbrook: "My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched"). These amendments therefore do not indicate congressional rejection of Revenue Ruling 71–447 and the standards contained therein.

[28] The District Court found, on the basis of a full evidentiary record, that the challenged practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage. 468 F. Supp., at 894. We assume, as did the District Court, that the same

As to such schools, it is argued that the IRS construction of §170 and §501(c)(3) violates their free exercise rights under the Religion Clauses of the First Amendment. This contention presents claims not heretofore considered by this Court in precisely this context.

This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs, *Wisconsin* v. *Yoder*, 406 U. S. 205, 219 (1972); *Sherbert* v. *Verner*, 374 U. S. 398, 402 (1963); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, see *Wisconsin* v. *Yoder*, *supra*, at 220; *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, *supra*, at 402–403. However, "[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982). See, *e. g.*, *McDaniel* v. *Paty*, 435 U. S. 618, 628, and n. 8 (1978); *Wisconsin* v. *Yoder*, *supra*, at 215; *Gillette* v. *United States*, 401 U. S. 437 (1971).

On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. In *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), for example, the Court held that neutrally cast child labor laws prohibiting sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature. The Court found no constitutional infirmity in "excluding [Jehovah's Witness children] from doing there what no other children may do." *Id.*, at 171. See also *Reynolds* v. *United States*, 98 U. S. 145 (1879); *United States* v. *Lee*, *supra*; *Gillette* v. *United States*, *supra*. Denial of tax benefits will inevitably have a substan-

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is true with respect to petitioner Goldsboro Christian Schools. See 436 F. Supp., at 1317.

tial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

The governmental interest at stake here is compelling. As discussed in Part II–B, *supra*, the Government has a fundamental, overriding interest in eradicating racial discrimination in education[29]—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, see *United States* v. *Lee, supra*, at 259–260; and no "less restrictive means," see *Thomas* v. *Review Board of Indiana Employment Security Div., supra*, at 718, are available to achieve the governmental interest.[30]

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[29] We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools "exer[t] a pervasive influence on the entire educational process," outweighing any public benefit that they might otherwise provide. *Norwood* v. *Harrison*, 413 U. S. 455, 469 (1973). See generally Simon 495–496.

[30] Bob Jones University also contends that denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden. It is well settled that neither a state nor the Federal Government may pass laws which "prefer one religion over another," *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947), but "[i]t is equally true" that a regulation does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961). See *Harris* v. *McRae*, 448 U. S. 297, 319–320 (1980). The IRS policy at issue here is founded on a "neutral, secular basis," *Gillette* v. *United States*, 401 U. S. 437, 452 (1971), and does not violate the Establishment Clause. See generally U. S. Comm'n on Civil Rights, Discriminatory Religious Schools and Tax Exempt Status 10–17 (1982). In addition, as the Court of Appeals noted, "the uniform application of the rule to all religiously operated schools

IV

The remaining issue is whether the IRS properly applied its policy to these petitioners. Petitioner Goldsboro Christian Schools admits that it "maintain[s] racially discriminatory policies," Brief for Petitioner in No. 81–1, p. 10, but seeks to justify those policies on grounds we have fully discussed. The IRS properly denied tax-exempt status to Goldsboro Christian Schools.

Petitioner Bob Jones University, however, contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage.[31] Although a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination, see, *e. g., Loving* v. *Virginia*, 388 U. S. 1 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431 (1973). We therefore find that the IRS properly applied Revenue Ruling 71–447 to Bob Jones University.[32]

The judgments of the Court of Appeals are, accordingly,

Affirmed.

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avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." 639 F. 2d 147, 155 (CA4 1980) (emphasis in original). Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979). But see generally Note, 90 Yale L. J. 350 (1980).

[31] This argument would in any event apply only to the final eight months of the five tax years at issue in this case. Prior to May 1975, Bob Jones University's admissions policy was racially discriminatory on its face, since the University excluded unmarried Negro students while admitting unmarried Caucasians.

[32] Bob Jones University also argues that the IRS policy should not apply to it because it is entitled to exemption under § 501(c)(3) as a "religious" organization, rather than as an "educational" institution. The record in

JUSTICE POWELL, concurring in part and concurring in the judgment.

I join the Court's judgment, along with Part III of its opinion holding that the denial of tax exemptions to petitioners does not violate the First Amendment. I write separately because I am troubled by the broader implications of the Court's opinion with respect to the authority of the Internal Revenue Service (IRS) and its construction of §§ 170(c) and 501(c)(3) of the Internal Revenue Code.

I

Federal taxes are not imposed on organizations "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . ." 26 U. S. C. § 501(c)(3). The Code also permits a tax deduction for contributions made to these organizations. § 170(c). It is clear that petitioners, organizations incorporated for educational purposes, fall within the language of the statute. It also is clear that the language itself does not mandate refusal of tax-exempt status to any private school that maintains a racially discriminatory admissions policy. Accordingly, there is force in JUSTICE REHNQUIST's argument that §§ 170(c) and 501(c)(3) should be construed as setting forth the only criteria Congress has established for qualification as a tax-exempt organization. See *post*, at 612–615 (REHNQUIST, J., dissenting). Indeed, were we writing prior to the history detailed in the Court's opinion, this could well be the construction I would adopt. But there has been a decade of acceptance that is persuasive in the circumstances of these cases, and I conclude that there are now sufficient reasons for accepting the IRS's construction of the Code as proscribing

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this case leaves no doubt, however, that Bob Jones University is both an educational institution and a religious institution. As discussed previously, the IRS policy properly extends to all private schools, including religious schools. See n. 29, *supra*. The IRS policy thus was properly applied to Bob Jones University.

tax exemptions for schools that discriminate on the basis of race as a matter of policy.

I cannot say that this construction of the Code, adopted by the IRS in 1970 and upheld by the Court of Appeals below, is without logical support. The statutory terms are not self-defining, and it is plausible that in some instances an organization seeking a tax exemption might act in a manner so clearly contrary to the purposes of our laws that it could not be deemed to serve the enumerated statutory purposes.[1] And, as the Court notes, if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education. See *ante*, at 595–596. Finally, and of critical importance for me, the subsequent actions of Congress present "an unusually strong case of legislative acquiescence in and ratification by implication of the [IRS's] 1970 and 1971 rulings" with respect to racially discriminatory schools. *Ante*, at 599. In particular, Congress' enactment of § 501(i) in 1976 is strong evidence of agreement with these particular IRS rulings.[2]

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[1] I note that the Court has construed other provisions of the Code as containing narrowly defined public-policy exceptions. See *Commissioner* v. *Tellier*, 383 U. S. 687, 693–694 (1966); *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30, 35 (1958).

[2] The District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. 1150 (three-judge court), summarily aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971), held that racially discriminatory private schools were not entitled to tax-exempt status. The same District Court, however, later ruled that racially segregated social clubs could receive tax exemptions under § 501(c)(7) of the Code. See *McGlotten* v. *Connally*, 338 F. Supp. 448 (1972) (three-judge court). Faced with these two important three-judge court rulings, Congress expressly overturned the relevant portion of *McGlotten* by enacting § 501(i), thus conforming the policy with respect to social clubs to the prevailing policy with respect to private schools. This affirmative step is a persuasive indication that Congress has not just silently acquiesced in the result of *Green*. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 402 (1982) (POWELL, J.,

II

I therefore concur in the Court's judgment that tax-exempt status under §§ 170(c) and 501(c)(3) is not available to private schools that concededly are racially discriminatory. I do not agree, however, with the Court's more general explanation of the justifications for the tax exemptions provided to charitable organizations. The Court states:

> "Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Ante*, at 591–592 (footnotes omitted).

Applying this test to petitioners, the Court concludes that "[c]learly an educational institution engaging in practices affirmatively at odds with [the] declared position of the whole Government cannot be seen as exercising a 'beneficial and stabilizing influenc[e] in community life,' . . . and is not 'charitable,' within the meaning of § 170 and § 501(c)(3)." *Ante*, at 598–599 (quoting *Walz* v. *Tax Comm'n*, 397 U. S. 664, 673 (1970)).

With all respect, I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear "public benefit" as defined by the Court. Over 106,000 organizations filed § 501(c)(3) returns in 1981. Internal Revenue Service, 1982 Exempt

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dissenting) (rejecting theory "that congressional intent can be inferred from silence, and that legislative inaction should achieve the force of law").

Organization/Business Master File. I find it impossible to believe that all or even most of those organizations could prove that they "demonstrably serve and [are] in harmony with the public interest" or that they are "beneficial and stabilizing influences in community life." Nor am I prepared to say that petitioners, because of their racially discriminatory policies, necessarily contribute nothing of benefit to the community. It is clear from the substantially secular character of the curricula and degrees offered that petitioners provide educational benefits.

Even more troubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole Government." Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As JUSTICE BRENNAN has observed, private, nonprofit groups receive tax exemptions because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Walz*, *supra*, at 689 (concurring opinion). Far from representing an effort to reinforce any perceived "common community conscience," the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.[3]

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[3] Certainly § 501(c)(3) has not been applied in the manner suggested by the Court's analysis. The 1,100-page list of exempt organizations includes—among countless examples—such organizations as American Friends Service Committee, Inc., Committee on the Present Danger,

Given the importance of our tradition of pluralism,[1] "[t]he interest in preserving an area of untrammeled choice for private philanthropy is very great." *Jackson* v. *Statler Foundation*, 496 F. 2d 623, 639 (CA2 1974) (Friendly, J., dissenting from denial of reconsideration en banc).

I do not suggest that these considerations always are or should be dispositive. Congress, of course, may find that some organizations do not warrant tax-exempt status. In these cases I agree with the Court that Congress has determined that the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior.

Jehovahs Witnesses in the United States, Moral Majority Foundation, Inc., Friends of the Earth Foundation, Inc., Mountain States Legal Foundation, National Right to Life Educational Foundation, Planned Parenthood Federation of America, Scientists and Engineers for Secure Energy, Inc., and Union of Concerned Scientists Fund, Inc. See Internal Revenue Service, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954, pp. 31, 221, 376, 518, 670, 677, 694, 795, 880, 1001, 1073 (Revised Oct. 1981). It would be difficult indeed to argue that each of these organizations reflects the views of the "common community conscience" or "demonstrably . . . [is] in harmony with the public interest." In identifying these organizations, largely taken at random from the tens of thousands on the list, I of course do not imply disapproval of their being exempt from taxation. Rather, they illustrate the commendable tolerance by our Government of even the most strongly held divergent views, including views that at least from time to time *are* "at odds" with the position of our Government. We have consistently recognized that such disparate groups are entitled to share the privilege of tax exemption.

[1] "A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system." *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 745 (1982) (POWELL, J., dissenting). Sectarian schools make an important contribution to this tradition, for they "have provided an educational alternative for millions of young Americans" and "often afford wholesome competition with our public schools." *Wolman* v. *Walter*, 433 U. S. 229, 262 (1977) (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part).

I would emphasize, however, that the balancing of these substantial interests is for *Congress* to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently "fundamental" to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy." As former IRS Commissioner Kurtz has noted, questions concerning religion and civil rights "are far afield from the more typical tasks of tax administrators—determining taxable income." Kurtz, Difficult Definitional Problems in Tax Administration: Religion and Race, 23 Catholic Lawyer 301 (1978). This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency fairly may be said to have expertise,[4] and this concern applies with special force when the asserted administrative power is one to determine the scope of public policy. As JUSTICE BLACKMUN has noted:

> "[W]here the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating

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[4] See, *e. g.*, *Community Television of Southern California* v. *Gottfried*, 459 U. S. 498, 510–511, n. 17 (1983) ("[A]n agency's general duty to enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency"); *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 114 (1976) ("It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies"); *NAACP* v. *FPC*, 425 U. S. 662, 670 (1976) ("The use of the words 'public interest' in the Gas and Power Acts is not a directive to the [Federal Power] Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of supplies of electric energy and natural gas at just and reasonable rates").

> at the time . . . , but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern." *Commissioner* v. *"Americans United" Inc.*, 416 U. S. 752, 774–775 (1974) (dissenting opinion).

III

The Court's decision upholds IRS Revenue Ruling 71–447, and thus resolves the question whether tax-exempt status is available to private schools that openly maintain racially discriminatory admissions policies. There no longer is any justification for *Congress* to hesitate—as it apparently has—in articulating and codifying its desired policy as to tax exemptions for discriminatory organizations. Many questions remain, such as whether organizations that violate other policies should receive tax-exempt status under § 501(c)(3). These should be legislative policy choices. It is not appropriate to leave the IRS "on the cutting edge of developing national policy." Kurtz, *supra*, at 308. The contours of public policy should be determined by Congress, not by judges or the IRS.

JUSTICE REHNQUIST, dissenting.

The Court points out that there is a strong national policy in this country against racial discrimination. To the extent that the Court states that Congress in furtherance of this policy could deny tax-exempt status to educational institutions that promote racial discrimination, I readily agree. But, unlike the Court, I am convinced that Congress simply has failed to take this action and, as this Court has said over and over again, regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for it.

In approaching this statutory construction question the Court quite adeptly avoids the statute it is construing. This I am sure is no accident, for there is nothing in the language of § 501(c)(3) that supports the result obtained by the Court. Section 501(c)(3) provides tax-exempt status for:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U. S. C. § 501(c)(3).

With undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status. An entity must be (1) a corporation, or community chest, fund, or foundation, (2) organized for one of the eight enumerated purposes, (3) operated on a nonprofit basis, and (4) free from involvement in lobbying activities and political campaigns. Nowhere is there to be found some additional, undefined public policy requirement.

The Court first seeks refuge from the obvious reading of § 501(c)(3) by turning to § 170 of the Internal Revenue Code, which provides a tax deduction for contributions made to § 501(c)(3) organizations. In setting forth the general rule, § 170 states:

> "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if ver-

> ified under regulations prescribed by the Secretary." 26 U. S. C. § 170(a)(1).

The Court seizes the words "charitable contribution" and with little discussion concludes that "[o]n its face, therefore, § 170 reveals that Congress' intention was to provide tax benefits to organizations serving charitable purposes," intimating that this implies some unspecified common-law charitable trust requirement. *Ante*, at 587.

The Court would have been well advised to look to subsection (c) where, as § 170(a)(1) indicates, Congress has defined a "charitable contribution":

> "For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of . . . [a] corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals; . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual; and . . . which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U. S. C. § 170(c).

Plainly, § 170(c) simply tracks the requirements set forth in § 501(c)(3). Since § 170 is no more than a mirror of § 501(c)(3 and, as the Court points out, § 170 followed § 501(c)(3) by more than two decades, *ante*, at 587, n. 10, it is at best o little usefulness in finding the meaning of § 501(c)(3).

Making a more fruitful inquiry, the Court next turns to th legislative history of § 501(c)(3) and finds that Congress in tended in that statute to offer a tax benefit to organizations that Congress believed were providing a public benefit. I certainly agree. But then the Court leaps to the conclusion that this history is proof Congress intended that an organization seeking § 501(c)(3) status "must fall within a category specified in that section *and must demonstrably serve and be in harmony with the public interest.*" *Ante*, at 592 (emphasis added). To the contrary, I think that the legislative history of § 501(c)(3) unmistakably makes clear that *Congress has decided* what organizations are serving a public purpose and providing a public benefit within the meaning of § 501(c)(3) and has clearly set forth in § 501(c)(3) the characteristics of such organizations. In fact, there are few examples which better illustrate Congress' effort to define and redefine the requirements of a legislative Act.

The first general income tax law was passed by Congress in the form of the Tariff Act of 1894. A provision of that Act provided an exemption for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes." Ch. 349, § 32, 28 Stat. 556 (1894). The income tax portion of the 1894 Act was held unconstitutional by this Court, see *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601 (1895), but a similar exemption appeared in the Tariff Act of 1909 which imposed a tax on corporate income. The 1909 Act provided an exemption for "any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual." Ch. 6, § 38, 36 Stat. 113 (1909).

With the ratification of the Sixteenth Amendment, Congress again turned its attention to an individual income tax with the Tariff Act of 1913. And again, in the direct predecessor of § 501(c)(3), a tax exemption was provided for "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual." Ch. 16, § II(G)(a), 38 Stat. 172 (1913). In subsequent Acts Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918 added an exemption for corporations or associations organized "for the prevention of cruelty to children or animals." Ch. 18, § 231(6), 40 Stat. 1057, 1076 (1918). The Revenue Act of 1921 expanded the groups to which the exemption applied to include "any community chest, fund, or foundation" and added "literary" endeavors to the list of exempt purposes. Ch. 136, § 231(6), 42 Stat. 253 (1921). The exemption remained unchanged in the Revenue Acts of 1924, 1926, 1928, and 1932.[1] In the Revenue Act of 1934 Congress added the requirement that no substantial part of the activities of any exempt organization can involve the carrying on of "propaganda" or "attempting to influence legislation." Ch. 277, § 101(6), 48 Stat. 700 (1934). Again, the exemption was left unchanged by the Revenue Acts of 1936 and 1938.[2]

The tax laws were overhauled by the Internal Revenue Code of 1939, but this exemption was left unchanged. Ch. 1, § 101(6), 53 Stat. 33 (1939). When the 1939 Code was replaced with the Internal Revenue Code of 1954, the exemption was adopted in full in the present § 501(c)(3) with the addition of "testing for public safety" as an exempt purpose and an additional restriction that tax-exempt organizations could not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Ch. 1, § 501(c)(3), 68A Stat. 163 (1954). Then in 1976 the statute was again amended adding to the purposes for which an exemption would be authorized, "to foster national or international amateur sports competition," provided the activities did not involve the provision of athletic facilities or equipment. Tax Reform Act of 1976, Pub. L. 94–455, § 1313(a), 90 Stat. 1730 (1976).

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[1] See Revenue Act of 1924, ch. 234, § 231(6), 43 Stat. 282; Revenue Act of 1926, ch. 27, § 231(6), 44 Stat. 40; Revenue Act of 1928, ch. 852, § 103(6), 45 Stat. 813; Revenue Act of 1932, ch. 209, § 103(6), 47 Stat. 193.

[2] See Revenue Act of 1936, ch. 690, § 101(6), 49 Stat. 1674; Revenue Act of 1938, ch. 289, § 101(6), 52 Stat. 481.

One way to read the opinion handed down by the Court today leads to the conclusion that this long and arduous refining process of § 501(c)(3) was certainly a waste of time, for when enacting the original 1894 statute Congress intended to adopt a common-law term of art, and intended that this term of art carry with it all of the common-law baggage which defines it. Such a view, however, leads also to the unsupportable idea that Congress has spent almost a century adding illustrations simply to clarify an already defined common-law term.

Another way to read the Court's opinion leads to the conclusion that even though Congress has set forth *some* of the requirements of a § 501(c)(3) organization, it intended that the IRS additionally require that organizations meet a higher standard of public interest, not stated by Congress, but to be determined and defined by the IRS and the courts. This view I find equally unsupportable. Almost a century of statutory history proves that Congress itself intended to decide what § 501(c)(3) requires. Congress has expressed its decision in the plainest of terms in § 501(c)(3) by providing that tax-exempt status is to be given to any corporation, or community chest, fund, or foundation that is organized for one of the eight enumerated purposes, operated on a nonprofit basis, and uninvolved in lobbying activities or political campaigns. The IRS certainly is empowered to adopt regulations for the enforcement of these specified requirements, and the courts have authority to resolve challenges to the IRS's exercise of this power, but Congress has left it to neither the IRS nor the courts to select or add to the requirements of § 501(c)(3).

The Court suggests that unless its new requirement be added to § 501(c)(3), nonprofit organizations formed to teach pickpockets and terrorists would necessarily acquire tax-exempt status. *Ante*, at 592, n. 18. Since the Court does not challenge the characterization of *petitioners* as "educational" institutions within the meaning of § 501(c)(3), and in fact states several times in the course of its opinion that petitioners *are* educational institutions, see, *e. g.*, *ante*, at 580, 583, 604, n. 29, 606, n. 32, it is difficult to see how this argument advances the Court's reasoning for disposing of petitioners' cases.

But simply because I reject the Court's heavyhanded creation of the requirement that an organization seeking § 501(c)(3) status must "serve and be in harmony with the public interest," *ante*, at 592, does not mean that I would deny to the IRS the usual authority to adopt regulations further explaining what Congress meant by the term "educational." The IRS has fully exercised that authority in Treas. Reg. § 1.501(c)(3)–1(d)(3), 26 CFR § 1.501(c)(3)–1(d)(3) (1982), which provides:

> "(3) *Educational defined*—(i) *In general.* The term 'educational', as used in section 501(c)(3), relates to—
>
> "(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> "(b) The instruction of the public on subjects useful to the individual and beneficial to the community.
>
> "An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.
>
> "(ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

> "*Example (1).* An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.
>
> "*Example (2).* An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs. Such programs may be on radio or television.
>
> "*Example (3).* An organization which presents a course of instruction by means of correspondence or through the utilization of television or radio.
>
> "*Example (4).* Museums, zoos, planetariums, symphony orchestras, and other similar organizations."

I have little doubt that neither the "Fagin School for Pickpockets" nor a school training students for guerrilla warfare and terrorism in other countries would meet the definitions contained in the regulations.

Prior to 1970, when the charted course was abruptly changed, the IRS had continuously interpreted § 501(c)(3) and its predecessors in accordance with the view I have expressed above. This, of course, is of considerable significance in determining the intended meaning of the statute. *NLRB* v. *Boeing Co.*, 412 U. S. 67, 75 (1973); *Power Reactor Development Co.* v. *Electrical Workers*, 367 U. S. 396, 408 (1961).

In 1970 the IRS was sued by parents of black public school children seeking to enjoin the IRS from according tax-exempt status under § 501(c)(3) to private schools in Mississippi that discriminated against blacks. The IRS answered, consistent with its longstanding position, by maintaining a lack of authority to deny the tax exemption if the schools met the specified requirements of § 501(c)(3). Then "[i]n the midst of this litigation," *Green* v. *Connally*, 330 F. Supp. 1150, 1156 (DC), summarily aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971), and in the face of a preliminary injunction, the IRS changed its position and adopted the view of the plaintiffs.

Following the close of the litigation, the IRS published its new position in Revenue Ruling 71-447, stating that "a school asserting a right to the benefits provided for in section 501(c)(3) of the Code as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section." Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. The IRS then concluded that a school that promotes racial discrimination violates public policy and therefore cannot qualify as a common-law charity. The circumstances under which this change in interpretation was made suggest that it is entitled to very little deference. But even if the circumstances were different, the latter-day wisdom of the IRS has no basis in § 501(c)(3).

Perhaps recognizing the lack of support in the statute itself, or in its history, for the 1970 IRS change in interpretation, the Court finds that "[t]he actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority," concluding that there is "an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings." *Ante*, at 599. The Court relies first on several bills introduced to overturn the IRS interpretation of § 501(c)(3). *Ante*, at 600, and n. 25. But we have said before, and it is equally applicable here, that this type of congressional inaction is of virtually no weight in determining legislative intent. See *United States* v. *Wise*, 370 U. S. 405, 411 (1962); *Waterman S.S. Corp.* v. *United States*, 381 U. S. 252, 269 (1965). These bills and related hearings indicate little more than that a vigorous debate has existed in Congress concerning the new IRS position.

The Court next asserts that "Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code," a provision that "denies tax-exempt status to social clubs whose charters or policy statements provide for" racial discrimination. *Ante*, at 601. Quite to the contrary, it seems to me that in § 501(i) Congress showed that when it wants to add a requirement prohibiting racial discrimination to one of the tax-benefit provisions, it is fully aware of how to do it. Cf. *Commissioner* v. *Tellier*, 383 U. S. 687, 693, n. 10 (1966).

The Court intimates that the Ashbrook and Dornan Amendments also reflect an intent by Congress to acquiesce in the new IRS position. *Ante*, at 602, n. 27. The amendments were passed to limit certain enforcement procedures proposed by the IRS in 1978 and 1979 for determining whether a school operated in a racially nondiscriminatory fashion. The Court points out that in proposing his amendment, Congressman Ashbrook stated: "'My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched.'" *Ibid.* The Court fails to note that Congressman Ashbrook also said:

> "The IRS has no authority to create public policy. . . . So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status. . . . There exists but a single responsibility which is proper for the Internal Revenue Service: To serve as tax collector." 125 Cong. Rec. 18444 (1979).

In the same debate, Congressman Grassley asserted: "Nobody argues that racial discrimination should receive preferred tax status in the United States. However, the IRS should not be making these decisions on the agency's own discretion. Congress should make these decisions." *Id.*, at 18448. The same debates are filled with other similar statements. While on the whole these debates do not show conclusively that Congress believed the IRS had exceeded its authority with the 1970 change in position, they likewise are far less than a showing of acquiescence in and ratification of the new position.

This Court continuously has been hesitant to find ratification through inaction. See *United States* v. *Wise*, *supra*. This is especially true where such a finding "would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency." *SEC* v. *Sloan*, 436 U. S. 103, 121 (1978). Few cases would call for more caution in finding ratification by acquiescence than the present ones. The new IRS interpretation is not only far less than a long-standing administrative policy, it is at odds with a position maintained by the IRS, and unquestioned by Congress, for several decades prior to 1970. The interpretation is unsupported by the statutory language, it is unsupported by legislative history, the interpretation has led to considerable controversy in and out of Congress, and the interpretation gives to the IRS a broad power which until now Congress had kept for itself. Where in addition to these circumstances Congress has shown time and time again that it is ready to enact positive legislation to change the Tax Code when it desires, this Court has no business finding that Congress has adopted the new IRS position by failing to enact legislation to reverse it.

I have no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination. I agree with the Court that Congress has the power to further this policy by denying § 501(c)(3) status to organizations that practice racial discrimination.[3] But as of yet Congress has failed to do so. Whatever the reasons for the failure, this Court should not legislate for Congress.[4]

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[3] I agree with the Court that such a requirement would not infringe on petitioners' First Amendment rights.

[4] Because of its holding, the Court does not have to decide whether it would violate the equal protection component of the Fifth Amendment for

Petitioners are each organized for the "instruction or training of the individual for the purpose of improving or developing his capabilities," 26 CFR § 1.501(c)(3)–1(d)(3) (1982), and thus are organized for "educational purposes" within the meaning of § 501(c)(3). Petitioners' nonprofit status is uncontested. There is no indication that either petitioner has been involved in lobbying activities or political campaigns. Therefore, it is my view that unless and until Congress affirmatively amends § 501(c)(3) to require more, the IRS is without authority to deny petitioners § 501(c)(3) status. For this reason, I would reverse the Court of Appeals.

Congress to grant § 501(c)(3) status to organizations that practice racial discrimination. *Ante*, at 599, n. 24. I would decide that it does not. The statute is facially neutral; absent a showing of a discriminatory purpose, no equal protection violation is established. *Washington* v. *Davis*, 426 U. S. 229, 241–244 (1976).

MORRISON-KNUDSEN CONSTRUCTION CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1891. Argued March 21, 1983—Decided May 24, 1983

Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) defines "wages" for the purpose of computing compensation benefits under the Act as meaning "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer." An employee of petitioner construction company (employer) was fatally injured while working on the District of Columbia Metrorail System. At the time of his death, the employee was covered by the District of Columbia Workmen's Compensation Act, which incorporates the LHWCA, and he was also a beneficiary of a collective-bargaining agreement between the employer and his union. The employer began to pay 66⅔% of the employee's "average weekly wage" in death benefits to his widow and minor children pursuant to the LHWCA. The widow disputed the amount of the benefits, claiming that her husband's average weekly wage included not only his take-home pay but also the 68¢ per hour in contributions the employer was required to make to union trust funds under the collective-bargaining agreement for health and welfare, pensions, and training. The Administrative Law Judge rejected the widow's claim and the Benefits Review Board affirmed, holding that only values that are readily identifiable and calculable may be included in the determination of wages and that the employee's rights in his union trust funds were too speculative to meet this definition. The Court of Appeals reversed, holding that the employer's contributions were a reasonable measurement of the value of the benefits to the employee.

Held: Employer contributions to union trust funds are not included in the term "wages" as defined in §2(13). Pp. 629–637.

(a) The contributions are not "money . . . recompensed" or "gratuities received . . . from others" nor are they a "similar advantage" to "board, rent, housing, [or] lodging." Board, rent, housing, or lodging are benefits with a present value that can readily be converted into a cash equiva lent on the basis of their market values, whereas the present value of the trust funds is not so easily converted into a cash equivalent. The employer's cost of maintaining the funds is irrelevant in this context, since it measures neither the employee's benefit nor his compensation. Nor can the value of the funds be measured by the employee's expectation of interest in them, for that interest is at best speculative. Pp. 630–632.

(b) The legislative history of the LHWCA, its structure, and the consistent policies of the agency charged with its enforcement, all show that Congress did not intend to include employer contributions to union trust funds in the statutory definition of "wages." Pp. 632–635.

(c) A comprehensive statute such as the LHWCA is not to be judicially expanded because of "recent trends." To expand the meaning of the term "wages" to include employer contributions to union trust funds would significantly alter the balance achieved by Congress between the concerns of longshoremen and harbor workers on the one hand, and their employers on the other. Such an expanded definition would also undermine the goal of providing prompt compensation to injured workers and their survivors. Pp. 635–637.

216 U. S. App. D. C. 50, 670 F. 2d 208, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 638.

Arthur Larson argued the cause for petitioners. With him on the briefs were *E. Barrett Prettyman, Jr., Walter A. Smith, Jr.*, and *Richard W. Galiher, Jr.*

Alan I. Horowitz argued the cause for the federal respondent in support of petitioners. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Geller, T. Timothy Ryan, Jr., Karen I. Ward, Mary-Helen Mautner*, and *Charles I. Hadden*.

Geo. S. Leonard argued the cause and filed a brief for respondent Hilyer.*

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*Briefs of *amici curiae* urging reversal were filed by *Dennis Lindsay* and *Robert E. Babcock* for the Alliance of American Insurers et al.; by *John C. Duncan III* and *William P. Dale* for the American Insurance Association; by *Thomas D. Wilcox* for the National Association of Stevedores; by *Thomas E. Cinnamond, H. Thomas Howell*, and *Rudolph L. Rose* for the National Council of Self-Insurers; and by *Jed L. Babbin* for the Shipbuilders Council of America.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether employer contributions to union trust funds for health and welfare, pensions, and training are "wages" for the purpose of computing compensation benefits under §2(13) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1425, 33 U. S. C. §902(13) (Compensation Act).

I

James Hilyer, an employee of petitioner Morrison-Knudsen Construction Co., was fatally injured while working on the construction of the District of Columbia Metrorail System. At the time of his death, Hilyer was covered by the District of Columbia Workmen's Compensation Act, D. C. Code §36-501 (1973), which incorporates the provisions of the Compensation Act. He was also a beneficiary of a collective-bargaining agreement between Morrison-Knudsen and his union, Local 456 of the Laborers' District Council of Washington, D. C., and Vicinity (AFL-CIO).

Immediately upon Hilyer's death, petitioner[1] began to pay 66⅔% of Hilyer's "average weekly wage" in death benefits to his wife and two minor children pursuant to 33 U. S. C. §909(b).[2] Respondent Hilyer disputed the amount of benefits paid, claiming, among other things, that her husband's average weekly wage included not only his take-home pay, as petitioner contended, but also the 68¢ per hour in contributions the employer was required to make to union trust funds under the terms of the collective-bargaining agreement.[3] The Administrative Law Judge rejected Mrs. Hilyer's contention and the Benefits Review Board affirmed. The Board reasoned that only values that are readily identifiable and calculable may be included in the determination of wages. Hilyer's rights in his union trust funds were speculative. It was not clear from the record whether his pension rights had vested, and even if they had, the value of his interest in the

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[1] Morrison-Knudsen's insurer, the Argonaut Insurance Co., is also a petitioner here. Both parties are referred to collectively as "petitioner."

[2] Section 909(b) requires the employer to pay a surviving husband or wife 50% of the deceased spouse's average weekly wages and each minor child (in excess of one) 16⅔% of the deceased parent's wages. In no event, however, is the amount payable to exceed 66⅔% of such wages. The statute also establishes a minimum level of death benefits by providing that "the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage" as determined by the Secretary of Labor, §909(e), so long as benefits do not exceed the deceased's average weekly wage.

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[3] In relevant part, that agreement provides:

"Section 5. The parties hereto agree to continue to operate the Health and Welfare Fund known as Laborers' District Council Trust Fund No. 3 for the benefit of the employees covered by this collective bargaining agreement. The Employers agree to pay to such fund an amount equal to twenty-eight cents ($.28) per hour . . . for all hours worked by employees who are covered by this Agreement . . . .

". . . The trustees shall use the payments to the Fund for the benefit of the Subway and Rapid Transit Laborers, their families and dependents, for medical, dental, and/or hospital care, compensation for injuries, and/or illness resulting from occupational activity, or for unemployment benefits, or for the purchase of insurance covering life and accidental death, accident disability benefits, hospitalization, surgical, medical and sickness benefits. . . .

. . . . .

"Section 6. Parties hereto agree to continue to operate the Pension and Disability . . . Fund known as Laborers' District Council Trust Fund No. 3 . . . . The employers shall pay such fund . . . thirty-five cents ($.35) per hour for all hours worked by employees . . . .

. . . . .

". . . The trustees shall use the payments to the Fund for Subway and Rapid Transit Laborers, and their families and shall cover all disability and pension benefits as may in the discretion of the trustees be agreed upon . . . .

. . . . .

"Section 9. The parties hereto agree to establish and operate a Training Fund for the purpose of insuring adequate trained manpower to perform the work covered by this collective bargaining agreement. The employers agree to pay to such fund . . . an amount equal to five cents ($0.05) per hour for all hours worked by employees . . . ." App. 37–40.

Pension and Disability Fund depended on his continued employment with petitioner, while the value of his interest in the health, welfare, and training funds was contingent on his need for these benefits. The Board also rejected the notion that the values could be computed from the amounts contributed by the employer, noting that the family in all likelihood would not have been able to purchase similar protection at the same cost.

Mrs. Hilyer[4] sought review of the Benefits Review Board's decision in the Court of Appeals for the District of Columbia Circuit, reiterating her contention that her husband's wages included the contributions that his employer made to the union trust funds.[5] The Court of Appeals reversed. It agreed with the Board that the term "wages" includes only values that are readily identifiable and calculable, but held that the benefits at issue here met that definition. The court reasoned that since the contributions were intended for the benefit of the workers, the trustees could be viewed as "no more than a channel; . . . a means by which the company provides life insurance, health insurance, retirement benefits, and career training for its employees." *Hilyer* v. *Morrison-Knudsen Construction Co.*, 216 U. S. App. D. C. 50, 53, 670 F. 2d 208, 211 (1981). Although the court conceded that the family would not be able to use the employer's contribution to purchase benefits of equivalent value, it relied on *United States ex rel. Sherman* v. *Carter*, 353 U. S. 210 (1957), for the proposition that the employer's contributions were a reasonable measurement of the value of the benefits to the employees.

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[4] The Director of the Office of Workers' Compensation Programs joined Mrs. Hilyer in her petition for review of the Benefits Review Board's decision. That Office has, however, since readopted its prior understanding that the term "wages" does not include employer contributions to union trust funds. See, *e. g., Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F. 2d 1336, 1343 (CA9 1982). Accordingly, before this Court, the federal respondent has taken a position in support of the petitioner.

[5] Mrs. Hilyer also disputed the manner in which the employer had accounted for the fact that Hilyer had worked for Morrison-Knudsen for only part of the year and had worked for substantially lower wages for the remainder of the year. The employer contended that the average weekly wages should be calculated on the basis of Hilyer's actual wages; Mrs. Hilyer claimed that under 33 U. S. C. § 910(b), his wages should be determined by reference to the wages of a fellow employee "of the same class" who had worked "substantially the whole" of the preceding year. The Benefits Review Board upheld a determination by the Administrative Law Judge in Mrs. Hilyer's favor but modified the amount of attorney's fees awarded under 33 U. S. C. § 928. The employer's and insurer's cross-appeal from that determination was consolidated by the Court of Appeals with Mrs. Hilyer's appeal of the Board's adverse determination on the definition of wages. The court affirmed the decision of the Board to modify the attorney's fees award but did not address the § 910(b) issue. Petitioner did not seek review of the determination on either the attorney's fees issue or the § 910(b) issue. Accordingly, neither determination is before us.

We granted certiorari, 459 U. S. 820 (1982), and we reverse.

II

This case involves the meaning of 33 U. S. C. § 902(13), a definitional section that was part of the Compensation Act in 1927, when it became law, and that has remained unchanged through 10 revisions of the Act.[6] The section provides:

> "'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

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[6] The statute was amended in 1934, 1938, 1948, 1956, 1960, 1961, and 1969 to revise or increase benefits. It was amended in 1958 to require employers to maintain a reasonably safe workplace. In 1959, it was amended to allow certain third-party actions. In 1972, the Act was comprehensively revised. See S. Rep. No. 97–498, p. 20 (1982).

A

We begin with the plain language of the Compensation Act. Since it is undisputed that the employers' contributions are not "money . . . recompensed" or "gratuities received . . . from others," the narrow question is whether these contributions are a "similar advantage" to "board, rent, housing, [or] lodging." We hold that they are not. Board, rent, housing, or lodging are benefits with a present value that can be readily converted into a cash equivalent on the basis of their market values.

The present value of these trust funds is not, however, so easily converted into a cash equivalent. Respondent Hilyer urges us to calculate the value by reference to the employer's cost of maintaining these funds or to the value of the employee's expectation interests in them, but we do not believe that either approach is workable. The employer's cost is irrelevant in this context; it measures neither the employee's benefit nor his compensation. It does not measure the benefit to the employee because his family could not take the 68¢ per hour earned by Mr. Hilyer to the open market to purchase private policies offering similar benefits to the group policies administered by the union's trustees. It does not measure compensation because the collective-bargaining agreement does not tie petitioner's costs to its workers' labors. To the contrary, the employee enjoys full advantage of the Training and Health and Welfare Funds as soon as he becomes a beneficiary of the collective-bargaining agreement. App. 37–38 and 40. He derives benefit from the Pension and Disability Fund according to the "pension credits" he earns. These pension credits are not correlated to the amount of the employer's contribution; the employer pays benefits for every hour the employee works, while the employee earns credits only for the first 1,600 hours of work in a given year. Furthermore, although the employer is never refunded money that has been contributed, the employee can lose credit if he works less than 200 hours in a year or fails to earn credit for four years. Significantly, the employee loses all advantage if he leaves his employment before he attains age 40 and accumulates 10 credits.[7] *Id.*, at 49–68.

Nor can the value of the funds be measured by the employee's expectation interest in them, for that interest is at best speculative. Employees have no voice in the administration of these plans and thus have no control over the level of funding or the benefits provided. Furthermore, the value of each fund depends on factors that are unpredictable. The value to the Hilyer family of the Health and Welfare Fund depends on its need for the services the Fund provides; the value of the Pension and Disability Fund depends on whether Hilyer's interest vested, see n. 7, *supra*. And the value of the Training Fund, which was established to insure "adequate trained manpower," see n. 3, *supra*, and not for the benefit of the individual workers, is even more amorphous.

United States ex rel. Sherman v. *Carter*, *supra*, is not to the contrary. That case concerned a claim under the Miller Act, 40 U. S. C. §270a *et seq.*, which requires a contractor working for the United States to furnish a surety bond to insure the payment of "sums justly due" employees. When the employer failed to contribute to the union trust funds as required by the employees' collective-bargaining agreement, the union trustees sued the surety on the bond. The Court allowed the trustees to maintain their action, reasoning that "contributions were a part of the compensation for the work to be done by [the] employees." 353 U. S., at 217–218. The Court did not, however, base its conclusion on the notion these contributions were included in wages. Indeed the Court specifically noted that the Miller Act "does not limit recovery on the statutory bond to 'wages.'" *Id.*, at 217. A far different situation obtains here, where the Compensation Act specifically limits benefits to the worker's "wages." See also *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959).

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[7] Since Hilyer worked for Morrison-Knudsen for less than a year, it is probable that his rights in the Pension and Disability Fund did not vest.

B

We are aided in our interpretation of § 902(13) by the legislative history of the Compensation Act, its structure, and the consistent policies of the agency charged with its enforcement. That history provides abundant indication that Congress did not intend to include employer contributions to benefit plans within the concept of "wages."

In 1927, when the Act was enacted, employer-funded fringe benefits were virtually unknown, see United States Bureau of Labor Statistics, Beneficial Activities of American Trade-Unions, Bull. No. 465, pp. 3–4 (Sept. 1928); cf. S. Rep. No. 963, 88th Cong., 2d Sess., 1–2 (1964). Although the Act was amended several times in the ensuing years, including substantial revision in 1972, there is no evidence in the legislative history indicating that Congress seriously considered the possibility that fringe benefits should be taken into account in determining compensation under the Act.[8] In comparison, over these same years, Congress has acted on several occasions to include fringe benefits in other statutory schemes, see, *e. g.*, the Davis-Bacon Act, 40 U. S. C. § 276a *et seq.*, which was amended in 1964 to bring the United States' wage practices "into conformity with modern wage payment practices." S. Rep. No. 963, *supra*, at 1.[9] From this evidence that Congress was aware of the significant changes in compensation practices, its willingness to amend and enact legislation in view of these changes, and its failure to amend the Compensation Act in the same manner, we can only conclude that Congress did not intend this expanded definition of "wages."[10]

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[8] It is not insignificant that the Senate Report accompanying the 1972 Amendments, which raised the maximum benefit from a specific sum to a multiple of the national average weekly wage, stated: "Today the average weekly wage for private, non-agriculture employees in the United States is $135 a week." S. Rep. No. 92–1125, p. 4 (1972). This figure apparently comes from earnings statistics provided by the Bureau of Labor Statistics, see United States Bureau of Labor Statistics, Handbook of Labor Statistics 1978, p. 321 (1979) (listing data from 1972). The Bureau determines "earnings" by "dividing payrolls by hours. . . . The earnings . . . do not measure the level of total labor costs . . . since *the following are excluded: . . . payment of various welfare benefits* . . . ." *Id.*, at 4. (Emphasis added.)

The structure of the Act lends further support for our conclusion; it uses the concept of wages in several ways: to determine disability and survivors' actual benefits, 33 U. S. C. §§ 908 and 909, and to calculate the minimum and maximum level of benefits, § 909(e) (survivors' benefits), § 906(b) (disability benefits). In the latter sense, the reference is to the "national average weekly wage." Since we have often stated that a word is presumed to have the same meaning in all subsections of the same statute, see *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980), we would expect the term "wages" to maintain the same meaning throughout the Compensation Act. Accordingly, were we to accept respondent Hilyer's argument, we would also have to conclude that in determining the national average weekly wage, the Secretary of Labor is required to evaluate the benefit provisions of collective-bargaining agreements throughout the Nation. Any attempt to make this determination on a national basis would involve deciding which benefits to include, a subject on which different branches of the Government differ, see Chen, The Growth of Fringe Benefits: Implications for Social Security, 104 Monthly Labor Review 3, 9, n. 6 (Nov. 1981).[11] It would also require deciding how the benefits should be evaluated. Evaluating benefits is not simple in "defined contribution" plans such as the one involved in this case; in "defined benefit" plans, where the employer's costs are actuarially determined to provide a certain level of services, the calculation is infinitely harder. See, *e. g.*, the collective-bargaining agreement between General Motors Corp. and the United Auto Workers, cited in App. F to Brief for National Council of Self-Insurers as *Amicus Curiae* 16a. Without clear indication from Congress that this approach with its attendant problems is required, we decline to adopt it.

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[9] See also, *e. g.*, 46 U. S. C. § 814 *et seq.* (1976 ed. and Supp. V); 39 U. S. C. § 1004 (1976 ed. and Supp. V); 38 U. S. C. § 2003A (1976 ed., Supp. V); 45 U. S. C. § 836; 38 U. S. C. § 4114; 41 U. S. C. § 351 *et seq.*

[10] Recent consideration of this issue by the Senate Committee on Labor and Human Resources is also suggestive. The Committee, which was charged with reviewing administration of the Act to, *inter alia*, "reduce incentives for fraud and abuse [and] to assure immediate compensation," S. Rep. No. 97-498, p. 1 (1982), recommended changing the Act's definition of wages "to confirm past practice and congressional intent and to reaffirm the previously settled rule that fringe benefits are excluded from the definition of 'wages.'" *Id.*, at 41. The Committee would have the definition amended to read:

"The term 'wages' means the money rate at which the service rendered by an employee is compensated . . . . *The term wages does not include fringe benefits, including but not limited to employer payments for or contributions to a retirement, pension, health and welfare, . . . fund or trust for the employee's or dependent's benefit . . . .*" *Id.*, at 3. (Emphasis added.)

Finally, we note that, with the exception of the instant case, the Director of Workers' Compensation has consistently taken the position that fringe benefits are not includible in wages, see *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F. 2d 1336 (CA9 1982), and letters filed by the Department of Labor in *Levis* v. *Farmers Export Co.*, appeal pending, No. 81–4258 (CA5), and *Waters* v. *Farmers Export Co.*, No. 81–4273 (same). See also U. S. Dept. of Labor, LS/HW Program Memorandum No. 32, June 17, 1968, reprinted in

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[11] Mrs. Hilyer asked only for the inclusion in wages of Morrison-Knudsen's contributions to union trust funds. Her argument appears to imply, however, that every benefit of her husband's employment should be evaluated to determine his wages. This would seem to require the Secretary of Labor to include in his determination of the national average weekly wage such diverse elements as employer contributions to Social Security, administrative costs of maintaining savings and thrift plans, and the costs of Christmas parties, company outings, or gold watches.

App. to Brief for American Insurance Association as *Amicus Curiae* 1a–4a. Prior to the Court of Appeals' decision in this case, the Benefits Review Board had uniformly rejected the argument pressed by respondent Hilyer. See, *e. g.*, *Waters* v. *Farmers Export Co.*, 14 BRBS 102 (1981); *Freer* v. *Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), rev'd in pertinent part and remanded *sub nom. Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra; Lawson* v. *Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Collins* v. *Todd Shipyards Corp.*, 5 BRBS 334 (1977). Although not controlling, the consistent practice of the agencies charged with the enforcement and interpretation of the Act are entitled to deference. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U. S. 170, 189–190 (1981); *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U. S. 46, 54–55 (1977). We discern nothing to suggest that Congress intended the phrase "wages" as used in § 902(13) to include employer contributions to fringe benefit plans.

III

Respondent Hilyer argues that, despite these clear indications to the contrary, the remedial policies underlying the Act authorize the agency and require us to expand the meaning of the term to reflect modern employment practices. It is argued that fringe benefits are advantageous to both the worker, who receives tax-free benefits that he otherwise would have to buy with after-tax dollars, and to the employer, who reduces payroll costs by providing his workers with services that they could not on their own purchase with equivalent dollars. Respondent Hilyer contends that the incentive to trade salary for benefits should not be diluted by failing to consider the value of the benefits in determining survivorship and disability rights.

There is force to this argument, but a comprehensive statute such as this Act is not to be judicially expanded because of "recent trends." *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U. S. 268, 279 (1980). There we recognized that the Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail. *Id.*, at 282, and n. 24; H. R. Rep. No. 1767, 69th Cong., 2d Sess., 19–20 (1927); cf. S. Rep. No. 92–1125, p. 5 (1972).

Against this background, reinterpretation of the term "wages" would significantly alter the balance achieved by Congress. As noted above, employer-funded benefits were virtually unknown in 1927; as a result, employers have long calculated their compensation costs on the basis of their cash payroll. Since 1927, however, the proportion of costs attributable to fringe benefits has increased significantly. In 1950, these benefits constituted only 5% of compensation costs; their value increased to 10% by 1970 and is over 15% presently. Chen, *supra*, at 5.[12] According to some projections, they could easily constitute more than one-third of labor costs by the middle of the next century, *ibid.* This shift in the relative value of take-home pay versus fringe benefits dramatically alters the cost factors upon which employers and their insurers have relied in ordering their affairs. If these reasonable expectations are to be altered, that is a task for Congress, *J. W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U. S. 586, 593 (1978).

An expanded definition of wages would also undermine the goal of providing prompt compensation to injured workers and their survivors. Under the Act as presently interpreted, more than 95% of all lost-time injuries are immediately compensated without recourse to the administrative process. In all but 0.1% of the cases, delays averaged less than 10 months. Report by the Comptroller General of the United States, Longshoremen's and Harbor Workers' Compensation Act Needs Amending 31, 41 (Apr. 1982).[13] This situation could well change drastically if every worker could challenge the manner in which his own wages were calculated or the basis used by the Secretary to determine the national average weekly wage.[14]

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[12] See also Handbook of Labor Statistics, *supra* n. 8, at 388–393. The Chen figures are based on data obtained from the United States Department of Commerce. The figures in the Handbook are not identical to Chen's because, as discussed above, the Departments of Commerce and Labor take different views on what benefits are to be included in the calculation of compensation.

The language of this statute, Congress' failure to include other benefits that were common in 1972, when the statute was amended, the longstanding administrative interpretation of the Act, and the policies underlying it, all combine to support our conclusion that Congress did not intend to include employer contributions to union trust funds in the Act's term "wages." Accordingly, the judgment of the Court of Appeals is

Reversed.

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[13] The report states that in the 5% of cases that are referred to an administrative law judge, delays average 4–4.5 months, Report by the Comptroller General, at 41. The 1% of cases that are appealed to the Benefits Review Board, *id.*, at 5, are resolved on the average in 10 months, *id.*, at 41. Only 0.1% of all lost-time injuries reach the Courts of Appeals, *id.*, at 5.

[14] It is argued that the standard of living of the injured worker's family will decrease if employer contributions are not included in wages because the family will be required to use a portion of their compensation benefits to purchase health, disability, training, and pension benefits for themselves. This argument is not well taken in the context of survivor benefits; upon the death of the worker, disability, pension, and training benefits have no relevance. Furthermore, under respondent Hilyer's interpretation of the statute, she would be entitled to a death benefit (had her husband's interest in his pension plan vested) as well as the funds necessary to purchase the benefit she has just received. We do not think Congress could have intended to provide this double "recovery." While it is true that once the worker's employment ends, his survivors will be forced to provide for their own health insurance, we do not believe that a statute as complex as this one should be interpreted in light of this single factor.

JUSTICE MARSHALL, dissenting.

On April 19, 1974, James H. Hilyer was run over by a cement truck while working for petitioner Morrison-Knudsen Construction Co. The dispute in this case concerns the calculation of the level of death benefits that should be paid to his widow and their two children. The appropriate level of benefits depends on the meaning of the term "wages" under § 2(13) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902(13). The Court of Appeals held that "wages" include employer contributions to union trust funds for health and welfare, pensions, and training.[1] Because I agree with the lower court, I respectfully dissent.

I

Legislative enactments framed in general terms and designed for prospective operation should be construed to apply to subjects falling within their general purview even though coming into existence after their passage. As this Court has recognized:

> "Old laws apply to changed situations. The reach of [an] act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U. S. 335, 339–340 (1941).

In interpreting old enactments, we should focus on the purpose of the statute. "Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed . . . ." *Griffiths* v. *Commissioner*, 308 U. S. 355, 358 (1939). As Justice Holmes explained:

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[1] *Hilyer* v. *Morrison-Knudsen Construction Co.*, 216 U. S. App. D. C. 50, 670 F. 2d 208 (1981). The only other Court of Appeals to address this question has reached the same conclusion. *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F. 2d 1336 (C[illegible] 1982).

> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (1908) (Circuit Justice), quoted in *United States* v. *Hutcheson*, 312 U. S. 219, 235 (1941).[2]

In this case, Congress enacted the pertinent statutory language in 1927. "Wages" were defined as "the money rate at which the service . . . is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer." Act of Mar. 4, 1927, §2(13), 44 Stat. (part 2) 1425. The question presented is whether payments made by an employer to union trust funds for the benefit of employees, pursuant to a collective-bargaining agreement, should be deemed "wages" under the Act. As the majority notes, when the Act became law in 1927, employer-funded fringe benefits were "virtually unknown." *Ante*, at 632. Since Congress therefore did not address the matter directly, we must interpret the words of the statute so as to carry out the congressional purpose underlying the Act.

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[2] For example, a statute enacted in 1880 before the invention of the automobile might well have applied to "carriages." Suppose that the statute requires all "carriages" to come to a stop before entering a crosswalk near a schoolyard. If the statutory purpose is to assure safety, a court should apply the statute to automobiles. On the other hand, suppose the statute provides that no "carriage" above a certain weight shall be used on a public road unless it is being drawn by at least two horses. If the statutory purpose is to assure that horses are not subject to too great a strain, it obviously follows that the law should not be applied to automobiles. The language of the enactment must be interpreted in light of its purposes. See 2 H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1214–1215 (Tent. ed. 1958).

The 1927 Longshoremen's Act was a direct response to decisions of this Court which limited the authority of the States to apply their workers' compensation laws to injured maritime workers. See *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219 (1924). In order to fill the void created by those decisions, Congress adopted a federal compensation scheme patterned after existing state workers' compensation laws. S. Rep. No. 973, 69th Cong., 1st Sess., 16 (1926); H. R. Rep. No. 1767, 69th Cong., 2d Sess., 20 (1927). In particular, the 1927 Act was derived from the New York State workers' compensation law, which was deemed one of the most progressive in the country. See *ibid.*; H. R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926). The definition of "wages" incorporated in the 1927 Act was lifted almost verbatim from the New York statute. Compare 33 U. S. C. §902(13) with N. Y. Work. Comp. Law §201.12 (McKinney 1965).

When Congress acted, the recognized aim of the New York workers' compensation scheme was to compensate for "*the loss of earning power* incurred in the common enterprise, irrespective of the question of negligence." *New York Central R. Co.* v. *White*, 243 U. S. 188, 204 (1917) (emphasis added). In describing the New York law on which the federal scheme was modeled, the New York Court of Appeals had stated: "[C]ompensation awarded the employee is not such as is recoverable under the rules of damages applicable in actions founded upon negligence. *It is based on loss of earning power . . . .*" *Winfield* v. *New York C. & H. R. R. Co.*, 216 N. Y. 284, 289, 110 N. E. 614, 616 (1915) (emphasis added). Accord, *Marhoffer* v. *Marhoffer*, 220 N. Y. 543, 547, 116 N. E. 379, 380 (1917) ("The award is to compensate for loss of earning power"). The Longshoremen's Act, like the New York law, thus focused on an employee's loss of earning capacity as a result of an occupational injury. See Act of Mar. 4, 1927, §§8(c)(21), (e), §§10(c), (d), 44 Stat. (part 2) 1428, 1429, 1431; *Vogler* v. *Ontario Knife Co.*, 223 App. Div. 550, 229 N. Y. S. 5 (1928); *Berenowski* v. *Anchor Window Cleaning Co.*, 221 App. Div. 155, 223 N. Y. S. 73 (1927).

Viewed against this background, the term "wages" as used in the 1927 Act should encompass employer-funded benefits because those benefits indisputably represent a portion of the employee's earning power. Union members with various benefits that they have collectively bargained for clearly have a greater earning capacity than employees with equal take-home pay but without such benefits. For the purposes of determining a worker's earning power, there is no principled distinction between direct cash payments and payments into a plan that provides benefits to the employee. If the employer had agreed to pay some fixed amount of money to its employees who, in turn, paid the amount into benefit funds, that amount would satisfy the majority's definition of wages since the benefit has "a present value that can be readily converted into a cash equivalent on the basis of [its] market valu[e]." *Ante*, at 630. In my view, the result should not change simply because the company agrees to eliminate an unnecessary transaction by paying the contributions directly to the trust funds. Employees may bargain to receive their compensation strictly in cash payments or may arrange to forgo a portion of those payments in exchange for certain fringe benefits. There is no reasoned basis for concluding that the employee's earning power should differ depending on which arrangement is chosen.

Fringe benefits now constitute over 15% of employers' compensation costs, and they could easily constitute more than one-third of labor costs by the middle of the next century. See *ante*, at 636. Such benefits are provided in exchange for labor and as a result of bargained agreements. In 1927, Congress explicitly included within the meaning of "wages" the reasonable value of "board, rent, housing, [and] lodging." At the time, these items were the known noncash components of an employee's earning power. In terms of a modern employee's earning power, fringe benefits are functionally equivalent and should be treated in the same manner.[3]

II

The majority's initial objection to including employee benefits within the meaning of "wages" involves the problem of valuation. In this case, the employer's contributions to the funds under the terms of the collective-bargaining agreement are readily identifiable: they amount to 68¢ per hour per employee. Yet the majority rejects such a measure, asserting that the employer's cost is "irrelevant in this context." *Ante*, at 630. I disagree. In my view, it is better to be roughly right than totally wrong. The trust funds obviously have *some* value for employees and simply to exclude them from consideration is hardly an appropriate response to uncertainty about their precise value. In addition, the statute itself calls only for inclusion of "the *reasonable* value" of noncash items, 33 U. S. C. § 902(13) (emphasis added). While an employer's contribution may understate the true value of the benefits received under the collective-bargaining agreement,[4] it nonetheless provides a readily identifiable and therefore reasonable surrogate for the "advantage" received. An employer's contribution to a trust fund has long been accepted as a reasonable measure of the value of fringe benefits when such benefits are expressly included in a statutory definition of wages. See, *e. g.*, the Davis-Bacon Act, 40 U. S. C. § 276a *et seq.*

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[3] The majority suggests that the standard of living of an injured worker's family might not decline in the event that the worker is fatally injured. "[U]pon the death of the worker, disability, pension, and training benefits have no relevance." *Ante*, at 637, n. 14. Of course, deceased workers also have no need for employer-provided room or board, but the reasonable value of such benefits is nonetheless included in the calculation of the employee's wages under the Longshoremen's Act. Indeed, none of the normal living expenses that must be provided from the worker's take-home pay continue to be required after a worker dies. This is obviously no reason for ignoring such pay in the calculation of wages. The point here is that all of these elements constitute the basis for the employee's earning power at the time of injury, and for that reason all of these elements should be included in the calculation of "wages." (It should also be remembered that survivors of a deceased employee may receive no more than two-thirds of the employee's "wages," 33 U. S. C. § 909(b), so there is little danger that their standard of living will improve significantly.)

The majority also relies heavily on Congress' "failure to amend" the Longshoremen's Act to provide specifically that fringe benefits constitute wages. *Ante*, at 633. Inferring Congress' intent from legislative silence is never an easy task. Such inferences are reasonable only under special circumstances, such as where a well-established agency or judicial statutory construction has been brought to the attention of the Congress, and the Legislature has not sought to alter that interpretation although it has amended the statute in other respects. *United States* v. *Rutherford*, 442 U. S. 544, 554, n. 10 (1979). In this case, there is no evidence that the administrative construction of the term "wages" has been brought to Congress' attention. Similarly, until the decision below, the term "wages" in the Longshoremen's Act had never been judicially defined to include or exclude fringe benefits. And the majority apparently concedes that Congress did not even consider the fringe benefit issue during its consideration of the 1972 Amendments to the Longshoremen's Act. See *ante*, at 632.

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[4] See *ante*, at 629, 630–631. Of course, this problem already arises with respect to benefits explicitly included under the Act such as "board." For example, an employer may contribute to a fund that provides free meals to its employees. If only because of economies of scale associated with feeding large numbers of employees, the employer's contribution would undoubtedly be less than the price required for employees individually to purchase similar meals on the open market.

The majority emphasizes that "Congress has acted on several occasions to include fringe benefits in *other* statutory schemes." *Ibid.* (emphasis added). The Court points to the Davis-Bacon Act, which historically contained *no* definition of the terms "wages,"[5] but which was amended in 1964 to provide a definition of the term that included fringe benefits. See *ante*, at 632–633. The majority then states that in light of Congress' willingness to amend some legislation but not the Longshoremen's Act, "we can only conclude that Congress did not intend this expanded definition of 'wages.'" *Ante*, at 633. However, the term "wage" or "wages" is used in over 1,200 separate subsections of the United States Code. That Congress has revised the meaning of the term in a few of these provisions hardly controls the meaning of the term in the vast number of other subsections. The notion that Congress has systematically examined existing legislation and amended definitional sections wherever appropriate is sheer fiction.

The majority also points to the "consistent" practices of the agencies charged with interpreting the Act. *Ante*, at 635. The force of this argument is diminished in this case by at least two considerations. First, fringe benefits have only recently begun to represent an appreciable portion of wages. It is for this reason that the meaning of the term "wages" has become a serious administrative issue only in the past few years. For example, the first decision of the Benefits Review Board that addressed the issue of fringe benefits was rendered only six years ago. See *Collins* v. *Todd Shipyards Corp.*, 5 BRBS 334 (1977). This case therefore does not present a situation where an agency's longstanding interpretation of a statute deserves "great weight," cf. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974), and it certainly does not involve a contemporaneous construction of a statute, cf. *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U. S. 46,

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[5] See Act of Mar. 3, 1931, ch. 411, § 1, 46 Stat. 1494; Act of Aug. 30, 1935, 49 Stat. 1011; Act of June 15, 1940, ch. 373, § 1, 54 Stat. 399; Act of July 12, 1960, § 26, 74 Stat. 418.

55 (1977). Second, in this very case, the Director of the Office of Workers' Compensation submitted a lengthy brief in the Court of Appeals contending that the Benefits Review Board had "clearly erred" when it excluded the employer's contributions to the union trust funds in computing the decedent's wages. Brief for Petitioner in No. 80–1504 (CADC), p. 9. The Director has now switched sides. Of course, agencies often make mistakes and disavow prior positions, but a call for deference to administrative expertise under these circumstances has a rather hollow ring.

Finally, the majority contends that a change in the manner of calculating wages could "drastically" undermine the goal of prompt compensation of injured workers and their survivors. *Ante*, at 637.[6] This concern is unfounded. As we have previously noted, the Longshoremen's Act "requires the employer to begin making the payments called for by the Act within 14 days after receiving notice of injury without awaiting resolution of the compensation claim and permits withholding of payments only to the extent of any dispute." *Intercounty Construction Corp.* v. *Walter*, 422 U. S. 1, 4, n. 4 (1975), citing § 14 of the Act, 33 U. S. C. § 914. Nor would compensation for employer-funded benefits lead to increased litigation under the Act. As long as fringe benefits are valued at some reasonable amount, the marginal increase in compensation to be gained by challenging the calculation of "wages" will almost certainly be small enough not to warrant resort to the administrative process. In any event, as the majority recognizes, such employer contributions are already included within a whole host of statutes, *ante*, at 632–633, and n. 9, yet there is no evidence to suggest that those provisions are administratively cumbersome.[7]

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[6] The majority hints at problems that would be caused by including in the calculation of wages "the costs of Christmas parties, company outings, or gold watches." *Ante*, at 634, n. 11. The simple answer is that the statute's express reference to recompense "under the contract of hiring" in force at the time of the injury, 33 U. S. C. § 902(13), suggests that the collective-bargaining agreement would provide a simple guide as to which fringe benefits to include in the calculation of wages. In any event, the Secretary of Labor has expressed no problems in calculating wages under those statutes which do require inclusion of fringe benefits.

Notably, the Davis-Bacon Act, which covers virtually all construction projects to which the United States or the District of Columbia is a party, applied to the very project on which Mr. Hilyer was working at the time of his death. That Act requires, *inter alia*, that all contractors and subcontractors make payments in accordance with prevailing wage determinations made by the Secretary of Labor, and requires contractors to post a scale of wages at the site of work. 40 U. S. C. § 276a(a). All wage determinations must include fringe benefits, § 276a(b), and the statute has been administered smoothly in this fashion for nearly 20 years. Thus, in this case, an accepted measure of the deceased's wages—including employer contributions—was readily available.

III

Shortly after the Longshoremen's Act became law, this Court stressed that it "should be construed liberally in furtherance of [its] purpose . . . and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408, 414 (1932). In my view, it would be incongruous to allow an employee's fringe benefits to rise without any corresponding protection in the event of injury or death, and harsh simply to ignore part of an employee's earning power when calculating benefits for his survivors. Because the majority's narrow construction of the term "wages" is fundamentally at odds with Congress' purpose in enacting the compensation scheme, I dissent.

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[7] Inclusion of fringe benefits in the compensation calculations has proved quite feasible in such diverse contexts as the Federal Employees Compensation Act, see 5 U. S. C. § 8101(12); *United States* v. *Crystal*, 39 F. Supp. 220 (ND Ohio 1941), the Miller Act, see *United States ex rel. Sherman* v. *Carter*, 353 U. S. 210 (1957), and state workers' compensation schemes, *e. g.*, *Hite* v. *Evart Products Co.*, 34 Mich. App. 247, 191 N. W. 2d 136 (1971). Even the existing calculation of wages under the Longshoremen's Act requires valuation of overtime, *Gray* v. *General Dynamics Corp.*, 5 BRBS 279 (1976), vacation pay, *Baldwin* v. *General Dynamics Corp.*, 5 BRBS 579 (1977), meals furnished employees, see *Harris* v. *Lambros*, 61 App. D. C. 16, 56 F. 2d 488 (1932), and such exotic items as automobile parts, *Carter* v. *General Elevator Co.*, 14 BRBS 90 (1981).

GENERAL MOTORS CORP. *v.* DEVEX CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1661. Argued December 7, 1982—Decided May 24, 1983

Prior to 1946 the section of the patent laws governing recovery in patent infringement actions contained no reference to interest. In 1946 the section was amended and now provides in 35 U. S. C. § 284 that the court shall award a successful claimant "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." In respondent Devex Corp.'s action against petitioner for infringement of a patent covering a lubricating process used in the cold-forming of metal car parts by pressure, the District Court entered judgment for Devex pursuant to § 284, awarding, in addition to royalties and postjudgment interest, prejudgment interest. After determining what the annual royalty payments would have been, the court calculated prejudgment interest on each payment from the time it would have become due. The Court of Appeals affirmed.

Held: The award of prejudgment interest was proper in this case. Pp. 651–657.

(a) Section 284 does not incorporate the pre-1946 common-law standard enunciated in *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U. S. 448, under which prejudgment interest could not be awarded where damages were unliquidated, absent bad faith or other exceptional circumstances. Rather, § 284 gives a court general authority to fix interest, and this authority, on the face of § 284, is not restricted to exceptional circumstances. Pp. 651–654.

(b) Both the background and language of § 284 provide evidence that the underlying purpose of the provision is that prejudgment interest should ordinarily be awarded where necessary to afford the plaintiff full compensation for the infringement. Consistent with this purpose, prejudgment interest should ordinarily be awarded absent some justification for withholding such an award. In the typical case an award of prejudgment interest is necessary to ensure that the patent owner is in as good a position as he would have been if the infringer had entered into a reasonable royalty agreement. An award of interest from the time that the royalty payments would have been received merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but also of the forgone use of the money between the time of infringement and the date of the judgment. Pp. 654–657.

667 F. 2d 347, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, *post*, p. 658.

George E. Frost argued the cause for petitioner. With him on the briefs was *Arthur G. Connolly.*

Sidney Bender argued the cause for respondents. With him on the brief were *Aaron Lewittes, Frederick B. Ziesenheim, David F. Anderson, William C. McCoy, Jr.,* and *Lynn Alstadt.**

JUSTICE MARSHALL, delivered the opinion of the Court.

This case concerns the proper standard governing the award of prejudgment interest in a patent infringement suit under 35 U. S. C. § 284.

I

In 1956 respondent Devex Corporation (Devex) filed a suit for patent infringement against petitioner General Motors Corporation (GMC) in the United States District Court for the Northern District of Illinois.[1] Devex alleged that GMC was infringing Reissue Patent No. 24,017, known as the "Henricks" or "Devex" patent. The patent covered a lubricating process used in the cold-forming of metal car parts by pressure.[2] On June 29, 1962, the District Court held the Devex patent invalid and entered judgment for GMC. On appeal the United States Court of Appeals for the Seventh Circuit reversed the finding of invalidity and remanded for further proceedings. *Devex Corp.* v. *General Motors Corp.*, 321 F. 2d 234 (1963), cert. denied, 375 U. S. 971 (1964).

**James B. Lynn, James N. Dresser,* and *Brian J. Leitten* filed a brief for the Bar Association of the District of Columbia as *amicus curiae* urging affirmance.

[1] The suit also named Houdaille Industries as a defendant. After the case against GMC was transferred to the United States District Court for the District of Delaware, the case against Houdaille Industries was tried separately, see *Devex Corp.* v. *Houdaille Industries, Inc.*, 382 F. 2d 17 (CA7 1967), and eventually settled.

The case was then transferred to the United States District Court for the District of Delaware. After a trial the District Court ruled that there had been no infringement. 316 F. Supp. 1376 (1970). The United States Court of Appeals for the Third Circuit reversed, holding that the patent was infringed by GMC's use of certain processes in the production of bumpers and cold-extruded nonbumper parts. 467 F. 2d 257 (1972), cert. denied, 411 U. S. 973 (1973).

On remand the case was referred to a Special Master for an accounting. The Special Master ruled that three major divisions of GMC had used infringing processes in the manufacture of bumper parts, and selected a royalty rate "by reference to hypothetical negotiations" that it found would have taken place if GMC had sought to obtain a license from Devex. Special Master's Report, at 71. See 667 F. 2d 347,

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[2] Claim 4 of the patent covers:

"The process of working ferrous metal which comprises forming on the surface of the metal a phosphate coating and superimposing thereon a fixed film of a composition comprising a solid meltable organic binding material containing distrubted there through a solid inorganic compound meltable at a temperature below the melting point of the ferrous metal phosphate of said coating and having a hardness not exceeding 5 on the Mohs' hardness scale, and thereafter deforming the metal."

In less technical terms, the Devex process employed "phosphate, soap and borax . . . to lubricate the pressure-forming operation, preventing harmful contact between the metal products and the machinery with which they are formed . . . . [T]he phosphate, soap and borax combination is especially beneficial because it may be easily cleaned from the metal product following its formation." 494 F. Supp. 1369, 1372 (Del. 1980).

352 (CA3 1981).[3] The District Court modified the royalty rate selected by the Special Master and entered judgment pursuant to 35 U. S. C. § 284, awarding Devex $8,813,945.50 in royalties, $11,022,854.97 in prejudgment interest, and postjudgment interest at the rate allowed by state law. 494 F. Supp. 1369 (1980). The court determined what the annual royalty payments would have been, and calculated prejudgment interest on each payment from the time it would have become due. The Court of Appeals affirmed. 667 F. 2d 347 (1981). The court held that "the award of [prejudgment] interest as the yearly royalty payments became due was not an abuse of discretion." *Id.*, at 363. We granted certiorari to consider the standard applicable to the award of prejudgment interest under 35 U. S. C. § 284, 456 U. S. 988 (1982), and we now affirm.

II

Prior to 1946 the provision of the patent laws concerning a plaintiff's recovery in an infringement action contained no reference to interest.[4] The award of interest in patent cases was governed by the common-law standard enunciated in several decisions of this Court. *E. g., Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U. S. 448 (1936); *Tilghman* v. *Proctor*, 125 U. S. 136 (1888). Under the *Duplate* standard, prejudgment interest was generally awarded from the date on which damages were liquidated, and could be awarded from the date of infringement in the absence of liquidation only in "exceptional circumstances," such as bad faith on the part of the infringer. 298 U. S., at 459.[5]

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[3] The Special Master also ruled that multiple damages and attorney's fees, which are authorized by 35 U. S. C. §§ 284 and 285, would be inappropriate in this case. 667 F. 2d, at 356, n. 8. These findings were adopted by the District Court and affirmed by the Court of Appeals and are not before us.

[4] Rev. Stat. § 4921, as amended, 42 Stat. 392, 35 U. S. C. § 70 (1964 ed.), provided in relevant part:

"[U]pon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby."

In 1946 Congress adopted amendments to the provision of the patent laws governing recovery in infringement actions. Act of Aug. 1, 1946, § 1, 60 Stat. 778, 35 U. S. C. §§ 67, 70 (1946 ed.).[6] One of the amended provisions, which has since been recodified as 35 U. S. C. § 284, states in relevant part:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."

The Courts of Appeals have reached differing conclusions as to whether § 284 incorporates the *Duplate* standard and more generally as to the standard governing the award of prejudgment interest under § 284.[7]

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[5] Under the common-law rule a plaintiff's damages were often treated as liquidated if they were relatively certain and ascertainable by reference to established market values. See generally *Miller* v. *Robertson*, 266 U. S. 243, 258 (1924); D. Dobbs, Law of Remedies § 3.5 (1973); C. McCormick, Law of Damages §§ 51, 54–56 (1935); Prejudgment Interest: An Element of Damages Not to be Overlooked, 8 Cumberland L. Rev. 521, 522–523 (1977). Thus a plaintiff whose damages were determined by reference to an established royalty that the plaintiff charged for the use of the patent was entitled to prejudgment interest. In contrast, where a plaintiff's damages, as here, were based on a reasonable royalty determined by the court, they were unliquidated and not entitled to prejudgment interest, absent exceptional circumstances.

[6] In the 1952 codification, §§ 67 and 70 of the 1946 Code were consolidated in § 284, which has remained unchanged through the present day. The stated purpose of the codification was merely "reorganization in language to clarify the statement of the statutes." H. R. Rep. No. 1923, 82d Cong., 2d Sess., 10, 29 (1952).

[7] Compare *Columbia Broadcasting System, Inc.* v. *Zenith Radio Corp.*, 537 F. 2d 896 (CA7 1976) (no prejudgment interest absent exceptional cir-

We have little doubt that § 284 does not incorporate the *Duplate* standard. Under that standard, which evolved as a matter of federal common law, prejudgment interest could not be awarded where damages were unliquidated, absent bad faith or other exceptional circumstances. By contrast, § 284 gives a court general authority to fix interest and costs. On the face of § 284, a court's authority to award interest is not restricted to exceptional circumstances, and there is no warrant for imposing such a limitation. When Congress wished to limit an element of recovery in a patent infringement action, it said so explicitly. With respect to attorney's fees, Congress expressly provided that a court could award such fees to a prevailing party only "in exceptional cases." 35 U. S. C. § 285.[8] The power to award interest was not similarly restricted.

There is no basis for inferring that Congress' adoption of the provision concerning interest merely incorporated the *Duplate* standard. This is not a case in which Congress has reenacted statutory language that the courts had interpreted in a particular way. In such a situation, it may well be appropriate to infer that Congress intended to adopt the established judicial interpretation. See, *e. g.*, *Herman &*

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cumstances); *Radiator Specialty Co.* v. *Micek*, 395 F. 2d 763 (CA9 1968) (same) (dictum), with *Georgia-Pacific Corp.* v. *U. S. Plywood-Champion Papers, Inc.*, 446 F. 2d 295 (CA2) (§ 284 does not incorporate *Duplate* standard), cert. denied, 404 U. S. 870 (1971); *Trio Process Corp.* v. *L. Goldstein's Sons, Inc.*, 638 F. 2d 661 (CA3 1981) (same); *General Electric Co.* v. *Sciaky Bros. Inc.*, 415 F. 2d 1068 (CA6 1969) (same); *Milgo Electronic Corp.* v. *United Business Communications, Inc.*, 623 F. 2d 645 (CA10) (same), cert. denied, 449 U. S. 1066 (1980).

[8] Section 285 provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." The phrase "exceptional cases" was not contained in the 1946 amendments, but was added by the 1952 compilation for purposes of clarification only. See n. 6, *supra*. The language of the 1946 amendments provided in relevant part that "the Court may *in its discretion* award reasonable attorney's fees to the prevailing party." 35 U. S. C. § 70 (1964 ed.) (emphasis added).

MacLean v. *Huddleston*, 459 U. S. 375, 384–386 (1983); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). In this case, however, the predecessor statute did not contain any reference to interest, and the 1946 amendments specifically added a provision concerning interest in patent infringement actions. We cannot agree with petitioner that the only significance of Congress' express provision for the award of interest was the incorporation of a common-law standard that developed in the absence of any specific provision concerning interest.

Having decided that § 284 does not incorporate the *Duplate* rule, we turn to a consideration of the proper standard for awarding prejudgment interest under that provision. Although the language of § 284 supplies little guidance as to the appropriate standard, for the reasons elaborated below we are convinced that the underlying purpose of the provision strongly suggests that prejudgment interest should ordinarily be awarded where necessary to afford the plaintiff full compensation for the infringement.

Both the background and language of § 284 provide evidence of this fundamental purpose. Under the pre-1946 statute, the owner of a patent could recover both his own damages and the infringer's profits. See *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476, 505 (1964); n. 4, *supra*. A patent owner's ability to recover the infringer's profits reflected the notion that he should be able to force the infringer to disgorge the fruits of the infringement even if it caused him no injury. In 1946 Congress excluded consideration of the infringer's gain by eliminating the recovery of his profits, *Aro Mfg. Co.*, *supra*, at 505, the determination of which had often required protracted litigation. H. R. Rep. No. 1587, 79th Cong., 2d Sess., 1–2 (1946); S. Rep. No. 1503, 79th Cong., 2d Sess., 2 (1946); 92 Cong. Rec. 9188 (1946) (remarks of Sen. Pepper). At the same time, Congress sought to ensure that the patent owner would in fact receive full compensation for "any damages" he suffered as a result of the infringement. See H. R. Rep. No. 1587, *supra*, at 1 ("any damages the complainant can prove"); S. Rep. No. 1503, *supra*, at 2 (same). Accordingly, Congress expressly provided in § 284 that the court "shall award the claimant damages *adequate to compensate* for the infringement." (Emphasis added.)[9]

The standard governing the award of prejudgment interest under § 284 should be consistent with Congress' overriding purpose of affording patent owners complete compensation. In light of that purpose, we conclude that prejudgment interest should ordinarily be awarded. In the typical case an award of prejudgment interest is necessary to ensure that the patent owner is placed in as good a position as he would have been in had the infringer entered into a reasonable royalty agreement.[10] An award of interest from the time that the royalty payments would have been received merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but also of the forgone use of the money between the time of infringement and the date of the judgment.

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[9] The wording of the amendment passed by Congress in 1946 was slightly different. It provided that the claimant "shall be entitled to recover general damages which shall be *due compensation*" for the infringement. 35 U. S. C. § 70 (1946 ed.) (emphasis added). See n. 6, *supra*.

Section 284 derived from a House bill which specifically provided for an award of interest "from the time the infringement occurred." H. R. 5311, 79th Cong., 2d Sess. (1946); see H. R. Rep. No. 1587, 79th Cong., 2d Sess., pt. 2, p. 1 (1946). The bill as modified by the Senate Committee and enacted into law replaced this language with the language currently contained in § 284. The legislative history suggests that the language substitution was intended solely to make the award of attorney's fees discretionary rather than mandatory; there was no indication that the Senate Committee intended any substantive change in the treatment of interest. See S. Rep. No. 1503, 79th Cong., 2d Sess., 2 (1946). The passage of the Senate bill in the House was preceded by an assurance by Representative Lanham, who managed the bill, that the only substantive modification of the House bill concerned the attorney's fees provision. 92 Cong. Rec. 9881 (1946).

[10] See *Waite* v. *United States*, 282 U. S. 508, 509 (1931); *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933) (interest from time of the taking is necessary to constitute adequate compensation under the Fifth Amendment); *Miller* v. *Robertson*, 266 U. S. 243, 258 (1924) (prejudgment interest required for "full compensation"). The traditional view, which treated prejudgment in-

This very principle was the basis of the decision in *Waite* v. *United States*, 282 U. S. 508 (1931), which involved a patent infringement suit against the United States. The patent owner had been awarded unliquidated damages in the form of lost profits, but had been denied an award of prejudgment interest. This Court held that an award of prejudgment interest to the patent owner was necessary to ensure "complete justice as between the plaintiff and the United States," *id.*, at 509, even though the statute governing such suits did not expressly provide for interest. Just as § 284 provides that the court shall award "damages adequate to compensate for the infringement," the statute at issue in *Waite* provided that the patentee shall receive "reasonable and entire compensation." 35 U. S. C. § 68 (1940 ed.). In addition, § 284 contains a specific provision concerning interest. *Waite* thus provides strong support for our conclusion that prejudgment interest should ordinarily be awarded under § 284.

We do not construe § 284 as requiring the award of prejudgment interest whenever infringement is found. That provision states that interest shall be "fixed by the court," and in our view it leaves the court some discretion in award-

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terest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages" and should be awarded as a component of full compensation. See Dobbs, *supra* n. 5, § 3.5, at 174; McCormick, *supra* n. 5, § 51, at 206–211; 8 Cumberland L. Rev., *supra* n. 5, at 521. A rule denying prejudgment interest not only undercompensates the patent owner but also may grant a windfall to the infringer and create an incentive to prolong litigation. There is no reason why an infringer should stand in a better position than a party who agrees to pay a royalty and then fails to pay because of financial difficulties.

ing prejudgment interest. For example, it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit.[11] There may be other circumstances in which it may be appropriate not to award prejudgment interest. We need not delineate those circumstances in this case. We hold only that prejudgment interest should be awarded under § 284 absent some justification for withholding such an award.

III

Because we hold that prejudgment interest should ordinarily be awarded absent some justification for withholding such an award, a decision to award prejudgment interest will only be set aside if it constitutes an abuse of discretion. The District Court held that GMC infringed Devex's patent over the course of a number of years and awarded Devex a reasonable royalty as compensation. While GMC contends that Devex was guilty of causing unnecessary delay, the District Court rejected this contention when it concluded that "Devex has done no worse than fully litigate its claims achieving a large judgment in its favor" and awarded Devex costs on the basis of this conclusion. 494 F. Supp., at 1380.[12] On these facts, we agree with the Court of Appeals that the award of prejudgment interest was proper.

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[11] See, *e. g., Board of Comm'rs* v. *United States*, 308 U. S. 343, 352–353 (1939); *Redfield* v. *Bartels*, 139 U. S. 694, 701 (1891); *First National Bank of Chicago* v. *Material Service Corp.*, 597 F. 2d 1110, 1120–1121 (CA7 1979). See generally McCormick, *supra* n. 5, at 220–221, 228–229 (cases cited therein); 8 Cumberland L. Rev., *supra* n. 5, at 534 (cases cited therein). The determination whether the plaintiff has unduly delayed prosecution of the lawsuit is committed to the discretion of the district court and is reviewable on appeal only for abuse of discretion.

[12] The District Court's decision to award costs rested on its conclusion that Devex did not cause "unnecessary delay or [obtain] only slight success." 494 F. Supp., at 1380. The Court of Appeals affirmed the award of costs, and that issue is not before us.

Accordingly, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

JUSTICE STEVENS, concurring.

The 1946 amendments to the patent laws replaced the *Duplate* standard with a presumption favoring the award of prejudgment interest in the ordinary case. As the Court correctly holds, however, §284 does not automatically require an "award of prejudgment interest whenever infringement is found." *Ante*, at 656. In exercising its discretion to deny such interest in appropriate cases, the trial court may properly take into account the nature of the patent and the strength of the defendant's challenge.

In other contexts we have noted the public function served by patent litigation. In *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 670 (1969), Justice Harlan, writing for the Court, explained:

> "A patent, in the last analysis, simply represents a legal conclusion reached by the Patent Office. Moreover, the legal conclusion is predicated on factors as to which reasonable men can differ widely. Yet the Patent Office is often obliged to reach its decision in an *ex parte* proceeding, without the aid of the arguments which could be advanced by parties interested in proving patent invalidity."

Hence, a patent challenge in the courts permits a more informed decision regarding the merits of a particular patent. And, as we have long recognized, "[i]t is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly . . . ." *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224, 234 (1892).

Of course, the general public interest in patent litigation does not justify denial of prejudgment interest in the typical case in which infringement is found. Wisely today the Court does not attempt to define precisely the category of cases in which an infringer, although ultimately unsuccessful in litigation, may have been sufficiently justified in its challenge to a particular patent to make it appropriate for the district court to exercise its discretion to deny prejudgment interest. But the existence of that category of cases should not be overlooked.

BEARDEN *v.* GEORGIA

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 81-6633. Argued January 11, 1983—Decided May 24, 1983

Petitioner pleaded guilty in a Georgia trial court to burglary and theft by receiving stolen property, but the court, pursuant to the Georgia First Offender's Act, did not enter a judgment of guilt and sentenced petitioner to probation on the condition that he pay a $500 fine and $250 in restitution, with $100 payable that day, $100 the next day, and the $550 balance within four months. Petitioner borrowed money and paid the first $200, but about a month later he was laid off from his job, and, despite repeated efforts, was unable to find other work. Shortly before the $550 balance became due, he notified the probation office that his payment was going to be late. Thereafter, the State filed a petition to revoke petitioner's probation because he had not paid the balance, and the trial court, after a hearing, revoked probation, entered a conviction, and sentenced petitioner to prison. The record of the hearing disclosed that petitioner had been unable to find employment and had no assets or income. The Georgia Court of Appeals rejected petitioner's claim that imprisoning him for inability to pay the fine and make restitution violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review.

Held: A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence, and hence here the trial court erred in automatically revoking petitioner's probation and turning the fine into a prison sentence without making such a determination. Pp. 664–674.

(a) If a State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. *Williams* v. *Illinois*, 399 U. S. 235; *Tate* v. *Short*, 401 U. S. 395. If the probationer has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection. But if the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the probationer are available to meet the State's interest in punishment and deterrence. Pp. 664–669.

(b) The State may not use as the sole justification for imprisonment the poverty or inability of the probationer to pay the fine and to make restitution if he has demonstrated sufficient bona fide efforts to do so. Pp. 669–672.

(c) Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay the fine. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. Pp. 672–673.

161 Ga. App. 640, 288 S. E. 2d 662, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 675.

James H. Lohr, by appointment of the Court, 459 U. S. 819, argued the cause *pro hac vice* and filed briefs for petitioner.

George M. Weaver, Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Michael J. Bowers*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, and *Marion O. Gordon* and *John C. Walden*, Senior Assistant Attorneys General.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question in this case is whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution. Its resolution involves a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources. We conclude that the trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist. We therefore reverse the judgment of the Georgia Court of Appeals upholding the revocation of probation, and remand for a new sentencing determination.

I

In September 1980, petitioner was indicted for the felonies of burglary and theft by receiving stolen property. He pleaded guilty, and was sentenced on October 8, 1980. Pursuant to the Georgia First Offender's Act, Ga. Code Ann. § 27–2727 *et seq.* (current version at § 42–8–60 *et seq.* (Supp. 1982)), the trial court did not enter a judgment of guilt, but deferred further proceedings and sentenced petitioner to three years on probation for the burglary charge and a concurrent one year on probation for the theft charge. As a condition of probation, the trial court ordered petitioner to pay a $500 fine and $250 in restitution.[1] Petitioner was to pay $100 that day, $100 the next day, and the $550 balance within four months.

Petitioner borrowed money from his parents and paid the first $200. About a month later, however, petitioner was laid off from his job. Petitioner, who has only a ninth-grade education and cannot read, tried repeatedly to find other work but was unable to do so. The record indicates that petitioner had no income or assets during this period.

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[1] The trial court ordered a payment of $200 restitution for the theft by receiving charge; and ordered payment of $50 in restitution and $500 fine for the burglary charge.

The other conditions of probation prohibited petitioner from leaving the jurisdiction of the court without permission, from drinking alcoholic beverages, using or possessing narcotics, or visiting places where alcoholic beverages or narcotics are sold, from keeping company with persons of bad reputation, and from violating any penal law; and required him to avoid places of disreputable character, to work faithfully at suitable employment insofar as possible, and to report to the probation officer as directed and to permit the probation officer to visit him.

Shortly before the balance of the fine and restitution came due in February 1981, petitioner notified the probation office he was going to be late with his payment because he could not find a job. In May 1981, the State filed a petition in the trial court to revoke petitioner's probation because he had not paid the balance.[2] After an evidentiary hearing, the trial court revoked probation for failure to pay the balance of the fine and restitution,[3] entered a conviction, and sentenced petitioner to serve the remaining portion of the probationary period in prison.[4] The Georgia Court of Appeals, relying on earlier Georgia Supreme Court cases,[5] rejected petitioner's claim that imprisoning him for inability to pay the fine violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review. Since other courts have held that revoking the probation of indigents for failure to pay fines does violate the Equal Protection Clause,[6] we granted certiorari to resolve this important issue in the administration of criminal justice. 458 U. S. 1105 (1982).

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[2] The State's petition alleged two grounds for revoking probation: petitioner's failure to pay the fine and restitution, and an alleged burglary he committed on May 10, 1981. The State abandoned the latter ground at the hearing to revoke probation, and counsel has informed us that petitioner was later acquitted of the charge. Brief for Petitioner 4, n. 1.

[3] The trial court also found that petitioner violated the conditions of probation by failing to report to his probation officer as directed. Since the trial court was unauthorized under state law to revoke probation on a ground not stated in the petition, *Radcliff* v. *State*, 134 Ga. App. 244, 214 S. E. 2d 179 (1975), the Court of Appeals upheld the revocation solely on the basis of petitioner's failure to pay the fine and restitution.

[4] The trial court first sentenced petitioner to five years in prison, with a concurrent 3-year sentence for the theft conviction. Since the record of the initial sentencing hearing failed to reveal that petitioner had been warned that a violation of probation could result in a longer prison term than the original probationary period, as required by *Stephens* v. *State*, 245 Ga. 835, 268 S. E. 2d 330 (1980), the court reduced the prison term to the remainder of the probationary period.

[5] *Hunter* v. *Dean*, 240 Ga. 214, 239 S. E. 2d 791 (1977), cert. dism'd, 439 U. S. 281 (1978); *Calhoun* v. *Couch*, 232 Ga. 467, 207 S. E. 2d 455 (1974).

II

This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956) (plurality opinion). *Griffin*'s principle of "equal justice," which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353 (1963) (indigent entitled to counsel on first direct appeal); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer* v. *Chicago*, 404 U. S. 189 (1971) (indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute). Most relevant to the issue here is the holding in *Williams* v. *Illinois*, 399 U. S. 235 (1970), that a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. *Williams* was followed and extended in *Tate* v. *Short*, 401 U. S. 395 (1971), which held that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. But the Court has also recognized limits on the principle of protecting indigents in the criminal justice system. For example, in *Ross* v. *Moffitt*, 417 U. S. 600 (1974), we held that indigents had no constitutional right to appointed counsel for a discretionary appeal. In *United States* v. *MacCollum*, 426 U. S. 317 (1976) (plurality opinion), we rejected an equal protection challenge to a federal statute which permits a district court to provide an indigent with a free trial transcript only if the court certifies that the challenge to his conviction is not frivolous and the transcript is necessary to prepare his petition.

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[6] See, *e. g.*, *Frazier* v. *Jordan*, 457 F. 2d 726 (CA5 1972); *In re Antazo*, 3 Cal. 3d 100, 473 P. 2d 999 (1970); *State* v. *Tackett*, 52 Haw. 601, 483 P. 2d 191 (1971); *State* v. *De Bonis*, 58 N. J. 182, 276 A. 2d 137 (1971); *State ex rel. Pedersen* v. *Blessinger*, 56 Wis. 2d 286, 201 N. W. 2d 778 (1972).

Due process and equal protection principles converge in the Court's analysis in these cases. See *Griffin* v. *Illinois*, *supra*, at 17. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. See, *e. g.*, *Griffin* v. *Illinois*, *supra*, at 29–39 (Harlan, J., dissenting); *Williams* v. *Illinois*, *supra*, at 259–266 (Harlan, J., concurring). As we recognized in *Ross* v. *Moffitt*, *supra*, at 608–609, we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

The question presented here is whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. The parties, following the framework of *Williams* and *Tate*, have argued the question primarily in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review. There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection

Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.[7] Whether analyzed in terms of equal protection or due process,[8] the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . ." *Williams* v. *Illinois*, *supra*, at 260 (Harlan, J., concurring).

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[7] We have previously applied considerations of procedural and substantive fairness to probation and parole revocation proceedings. In *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), where we established certain procedural requirements for parole revocation hearings, we recognized that society has an "interest in treating the parolee with basic fairness." *Id.*, at 484. We addressed the issue of fundamental fairness more directly in *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), where we held that in certain cases "fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." *Id.*, at 790. Fundamental fairness, we determined, presumptively requires counsel when the probationer claims that "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate." *Ibid.* In *Douglas* v. *Buder*, 412 U. S. 430 (1973), we found a substantive violation of due process when a state court had revoked probation with no evidence that the probationer had violated probation. Today we address whether a court can revoke probation for failure to pay a fine and restitution when there is no evidence that the petitioner was at fault in his failure to pay or that alternative means of punishment were inadequate.

[8] A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished," *North Carolina* v. *Pearce*, 395 U. S. 711, 723 (1969). The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

In analyzing this issue, of course, we do not write on a clean slate, for both *Williams* and *Tate* analyzed similar situations. The reach and limits of their holdings are vital to a proper resolution of the issue here. In *Williams*, a defendant was sentenced to the maximum prison term and fine authorized under the statute. Because of his indigency he could not pay the fine. Pursuant to another statute equating a $5 fine with a day in jail, the defendant was kept in jail for 101 days beyond the maximum prison sentence to "work out" the fine. The Court struck down the practice, holding that "[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." 399 U. S., at 241–242. In *Tate* v. *Short*, 401 U. S. 395 (1971), we faced a similar situation, except that the statutory penalty there permitted only a fine. Quoting from a concurring opinion in *Morris* v. *Schoonfield*, 399 U. S. 508, 509 (1970), we reasoned that "'the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.'" 401 U. S., at 398.

The rule of *Williams* and *Tate*, then, is that the State cannot "'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" *Tate*, *supra*, at 398. In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. As the Court made clear in *Williams*, "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs." 399 U. S., at 242, n. 19. Likewise in *Tate*, the Court "emphasize[d] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U. S., at 400.

This distinction, based on the reasons for nonpayment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. See ALI, Model Penal Code § 302.2(1) (Prop. Off. Draft 1962). Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own,[9] it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a "substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate." *Gagnon* v. *Scarpelli*, 411 U. S. 778, 790 (1973).[10] Cf. *Zablocki* v. *Redhail*, 434 U. S. 374, 400 (1978) (POWELL, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay).

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[9] We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed. Cf. *Powell* v. *Texas*, 392 U. S. 514 (1968); *Robinson* v. *California*, 370 U. S. 660 (1962). Ultimately, it must be remembered that the sentence was not imposed for a circumstance beyond the probationer's control "but because he had committed a crime." *Williams*, 399 U. S., at 242. In contrast to a condition like chronic drunken driving, however, the condition at issue here—indigency—is itself no threat to the safety or welfare of society.

The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources. See *Williams* v. *New York*, 337 U. S. 241, 250, and n. 15 (1949). As we said in *Williams* v. *Illinois*, "[a]fter having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law." 399 U. S., at 243.

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[10] Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine. For example, in *United States* v. *Boswell*, 605 F. 2d 171 (CA5 1979), the court distinguished between revoking probation where the defendant did not have the resources to pay restitution and had no way to acquire them—a revocation the court found improper—from revoking probation where the defendant had the resources to pay or had negligently or deliberately allowed them to be dissipated in a manner that resulted in his inability to pay—an entirely legitimate action by the trial court. Accord, *United States* v. *Wilson*, 469 F. 2d 368 (CA2 1972); *United States* v. *Taylor*, 321 F. 2d 339 (CA4 1963); *In re Antazo*, 3 Cal. 3d, at 115–117, 473 P. 2d, at 1007–1009; *State* v. *Huggett*, 55 Haw. 632, 525 P. 2d 1119 (1974); *Huggett* v. *State*, 83 Wis. 2d 790, 800–802, 266 N. W. 2d 403, 408 (1978). Commentators have similarly distinguished between the permissibility of revoking probation for contumacious failure to pay a fine, and the impermissibility of revoking probation when the probationer made good-faith efforts to pay. See, *e. g.*, ABA Standards for Criminal Justice 18–7.4 and Commentary (2d ed. 1980) ("incarceration should be employed only after the court has examined the reasons for nonpayment"); ALI, Model Penal Code § 302.2 (Prop. Off. Draft 1962) (distinguishing "contumacious" failure to pay fine from "good faith effort" to obtain funds); National Advisory Commission on Criminal Justice Standards and Goals, Corrections § 5.5 (1973); National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act §§ 3–403, 3–404 (1978). See also Me. Rev. Stat. Ann., Tit. 17–A, § 1304 (Supp. 1982); Ill. Rev. Stat., ch. 38, ¶ 1005–6–4(d) (1981).

The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. See *Williams* v. *Illinois*, *supra*, at 264 (Harlan, J., concurring); *Wood* v. *Georgia*, 450 U. S. 261, 286–287 (1981) (WHITE, J., dissenting). A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests. But a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms. The State nevertheless asserts three reasons why imprisonment is required to further its penal goals.

First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.

Second, the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. We have already indicated that a sentencing court can consider a defendant's employment history and financial resources in setting an initial punishment. Such considerations are a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime. But it must be remembered that the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer who, by assumption, has demonstrated sufficient bona fide efforts to find a job and pay the fine and whom the State initially thought it unnecessary to imprison. Given the significant interest of the individual in remaining on probation, see *Gagnon* v. *Scarpelli, supra; Morrissey* v. *Brewer*, 408 U. S. 471 (1972), the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous.[11] This would be little more than punishing a person for his poverty.

Third, and most plausibly, the State argues that its interests in punishing the lawbreaker and deterring others from criminal behavior require it to revoke probation for failure to pay a fine or restitution. The State clearly has an interest in punishment and deterrence, but this interest can often be served fully by alternative means. As we said in *Williams*, 399 U. S., at 244, and reiterated in *Tate*, 401 U. S., at 399, "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan appropriately observed in his concurring opinion in *Williams* that "the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment." 399 U. S., at 265. Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, see *Williams*, *supra*, at 244, n. 21, a sentencing court can often establish a reduced fine or alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources. Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.

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[11] The State emphasizes several empirical studies suggesting a correlation between poverty and crime. *E. g.*, Green, Race, Social Status, and Criminal Arrest, 35 Am. Sociological Rev. 476 (1970); M. Wolfgang, R. Figlio, & T. Sellin, Delinquency in a Birth Cohort (1972).

We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.[12]

III

We return to the facts of this case. At the probation revocation hearing, the petitioner and his wife testified about their lack of income and assets and of his repeated efforts to obtain work. While the sentencing court commented on the availability of odd jobs such as lawnmowing, it made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding. This lack of findings is understandable, of course, for under the rulings of the Georgia Supreme Court[13] such an inquiry would have been irrelevant to the constitutionality of revoking probation. The State argues that the sentencing court determined that the petitioner was no longer a good probation risk. In the absence of a determination that the petitioner did not make sufficient bona fide efforts to pay or to obtain employment in order to pay, we cannot read the opinion of the sentencing court as reflecting such a finding. Instead, the court curtly rejected counsel's suggestion that the time for making the payments be extended, saying that "the fallacy in that argument" is that the petitioner has long known he had to pay the $550 and yet did not comply with the court's prior order to pay. App. 45. The sentencing judge declared that "I don't know any way to enforce the prior orders of the Court but one way," which was to sentence him to imprisonment. *Ibid.*

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[12] As our holding makes clear, we agree with JUSTICE WHITE that poverty does not insulate a criminal defendant from punishment or necessarily prevent revocation of his probation for inability to pay a fine. We reject as impractical, however, the approach suggested by JUSTICE WHITE. He would require a "good-faith effort" by the sentencing court to impose a term of imprisonment that is "roughly equivalent" to the fine and restitution that the defendant failed to pay. *Post*, at 675. Even putting to one side the question of judicial "good faith," we perceive no meaningful standard by which a sentencing or reviewing court could assess whether a given prison sentence has an equivalent sting to the original fine. Under our holding the sentencing court must focus on criteria typically considered daily by sentencing courts throughout the land in probation revocation hearings: whether the defendant has demonstrated sufficient efforts to comply with the terms of probation and whether nonimprisonment alternatives are adequate to satisfy the State's interests in punishment and deterrence. Nor is our requirement that the sentencing court consider alternative forms of punishment a "novel" requirement. In both *Williams* and *Tate*, the Court emphasized the availability of alternative forms of punishment in holding that indigents could not be subjected automatically to imprisonment.

[13] See cases cited in n. 5, *supra*.

The focus of the court's concern, then, was that the petitioner had disobeyed a prior court order to pay the fine, and for that reason must be imprisoned. But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*. By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

We do not suggest by our analysis of the present record that the State may not place the petitioner in prison. If, upon remand, the Georgia courts determine that petitioner did not make sufficient bona fide efforts to pay his fine, or determine that alternative punishment is not adequate to meet the State's interests in punishment and deterrence, imprisonment would be a permissible sentence. Unless such determinations are made, however, fundamental fairness requires that the petitioner remain on probation.

IV

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

We deal here with the recurring situation where a person is convicted under a statute that authorizes fines or imprisonment or both, as well as probation. The defendant is then fined and placed on probation, one of the conditions of which is that he pay the fine and make restitution. In such a situation, the Court takes as a given that the State has decided that imprisonment is inappropriate because it is unnecessary to achieve its penal objectives. But that is true only if the defendant pays the fine and makes restitution and thereby suffers the financial penalty that such payment entails. Had the sentencing judge been quite sure that the defendant could not pay the fine, I cannot believe that the court would not have imposed some jail time or that either the Due Process or Equal Protection Clause of the Constitution would prevent such imposition.

Poverty does not insulate those who break the law from punishment. When probation is revoked for failure to pay a fine, I find nothing in the Constitution to prevent the trial court from revoking probation and imposing a term of imprisonment if revocation does not automatically result in the imposition of a long jail term and if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the State's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay. See *Wood* v. *Georgia*, 450 U. S. 261, 284–287 (1981) (WHITE, J., dissenting).

The Court holds, however, that if a probationer cannot pay the fine for reasons not of his own fault, the sentencing court must at least consider alternative measures of punishment other than imprisonment, and may imprison the probationer only if the alternative measures are deemed inadequate to meet the State's interests in punishment and deterrence.

Ante, at 672–673. There is no support in our cases or, in my view, the Constitution, for this novel requirement.

The Court suggests, *ante*, at 673, n. 12, that if the sentencing court rejects nonprison alternatives as "inadequate," it is "impractical" to impose a prison term roughly equivalent to the fine in terms of achieving punishment goals. Hence, I take it, that had the trial court in this case rejected nonprison alternatives, the sentence it imposed would be constitutionally impregnable. Indeed, there would be no bounds on the length of the imprisonment that could be imposed, other than those imposed by the Eighth Amendment. But *Williams* v. *Illinois*, 399 U. S. 235 (1970), and *Tate* v. *Short*, 401 U. S. 395 (1971), stand for the proposition that such "automatic" conversion of a fine into a jail term is forbidden by the Equal Protection Clause, and by so holding, the Court in those cases was surely of the view that there is a way of converting a fine into a jail term that is not "automatic." In building a superstructure of procedural steps that sentencing courts must follow, the Court seems to forget its own concern about imprisoning an indigent person for failure to pay a fine.

In this case, in view of the long prison term imposed, the state court obviously did not find that the sentence was "a rational and necessary trade-off to punish the individual who possesse[d] no accumulated assets", *Williams* v. *Illinois*, *supra*, at 265 (Harlan, J., concurring). Accordingly, I concur in the judgment.

UNITED STATES *v.* RODGERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1476. Argued December 6, 1982—Decided May 31, 1983*

These cases present the issue whether § 7403 of the Internal Revenue Code of 1954—which authorizes a federal district court, in a suit instituted by the Government, to decree a sale of certain properties to satisfy the tax indebtedness of delinquent taxpayers—empowers a district court to order the sale of the family home in which a delinquent taxpayer had an interest at the time he incurred his indebtedness, but in which the taxpayer's spouse, who does not owe any of that indebtedness, also has a separate "homestead" right as defined by Texas law. Under Texas statutory and constitutional provisions, each spouse—regardless of whether one or both owns the fee interest—has a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment and may not be compromised by either the other spouse or his or her heirs, and which in effect is an interest akin to an undivided life estate in the property. In the *Rodgers* case, the Government filed suit against respondents, the widow, children, and executor of Philip Bosco, to reduce to judgment, assessments made against Philip before his death for unpaid taxes and to enforce the Government's tax liens, including one that had attached to his interest in the homestead. The District Court granted summary judgment on respondents' claim that the tax liens could not defeat the widow's state-created right not to have her homestead (which she continued to occupy) subjected to a forced sale. The Court of Appeals affirmed. In the *Ingram* case, which involved tax assessments made before a divorce both against the husband alone relating to unpaid taxes withheld from employee's wages and against both spouses relating to their joint income tax liability, the residence was destroyed by fire shortly before the divorce, and the Government, as a defendant in quiet title proceedings in Federal District Court, filed a counterclaim against both spouses, seeking judicial sale of the property under § 7403. Pursuant to the parties' stipulation, the property was sold and the proceeds were deposited in the court's registry, the parties agreeing that their rights would be determined as if the sale had not taken place and that the proceeds would be divided according to their respective interests. The District Court granted summary judgment on the Government's counterclaim. Affirming in part, and revers-

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*Together with *United States* v. *Ingram et al.*, also on certiorari to the same court (see this Court's Rule 19.4).

ing and remanding in part, the Court of Appeals agreed that the Government could foreclose its lien on the proceeds to collect for the income tax owed by both spouses jointly, but held that the Government could not reach the proceeds to collect the husband's individual liability if the wife had maintained her homestead interest in the property. The court remanded for a factual determination of whether the wife had "abandoned" the homestead by dividing the fire insurance proceedings with the husband and by attempting, before the stipulation with the Government, to sell the property and divide the proceeds with the husband.

Held:

1. Section 7403 grants power to a federal district court to order the sale of the home itself, not just the delinquent taxpayer's *interest* in the property. If the home is sold, the nondelinquent spouse is entitled, as part of the distribution of proceeds required under § 7403, to so much of the proceeds as represents complete compensation for the loss of such spouse's separate homestead interest. Pp. 690–702.

(a) While the Government's lien cannot extend beyond the property interests held by the delinquent taxpayer, the plain meaning of the statute authorizes sale of the entire property. Section 7403(a) provides that the Government may seek to "subject *any property*, of whatever nature, of the delinquent, or *in which he has any right, title, or interest*, to the payment of such tax or liability." Section 7403(b) then provides that all persons "*claiming any interest in the property involved in such action*" shall be made parties thereto, and § 7403(c) provides that the district court should "determine the merits of *all* claims" to the property and if the Government's claim is established, "may decree a sale *of such property . . . and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.*" Reading § 7403 to authorize sale of the entire property is also consistent with the policy of prompt and certain collection of delinquent taxes and with the history of state *in rem* tax enforcement proceedings, and is further bolstered by a comparison with the statutory language which limits the Government's *administrative* remedy, available under 26 U. S. C. § 6331, to sale of the delinquent taxpayer's *interest* in property. Moreover, § 7403's requirements for distribution of the proceeds of the sale provide compensation for the taking of the property interest (such as the homestead estate in Texas) of an innocent third party, thus precluding any difficulties under the Due Process Clause of the Fifth Amendment. Pp. 690–700.

(b) Nor do the special protections accorded by the exemption aspect of Texas homestead law immunize property held as a homestead by a nondelinquent third party from the reach of § 7403. No such exception appears on the face of § 7403, and the Supremacy Clause—which provides the underpinning for the Federal Government's right to sweep aside state-created exemptions in the first place—is as potent in its application to innocent bystanders as in its application to delinquent debtors. Pp. 700–702.

2. Section 7403, which provides that a district court "may" decree the sale of property, does not require the court to authorize a forced sale under absolutely all circumstances. Some limited room is left in the statute for the exercise of reasoned discretion. Pp. 703–712.

(a) The principle of statutory construction that the word "may" usually implies some degree of discretion can be defeated by indications of contrary legislative intent or by obvious inferences from the statute's structure and purpose. Such indications or inferences are not present here. Pp. 706–709.

(b) In determining whether to authorize a sale under § 7403 when the interests of nondelinquent third parties are involved, a district court should consider such factors as the following: (1) the extent to which the Government's financial interests would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes; (2) whether the third party with a nonliable separate interest in the property would, in the normal course of events, have a legally recognized expectation that such separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors; (3) the likely prejudice to the third party, both in personal dislocation costs and in practical undercompensation; and (4) the relative character and value of the nonliable and liable interests held in the property. Pp. 709–711.

(c) In the *Rodgers* case, no individualized equitable balance of such factors has yet been attempted, this being a matter for the District Court in the first instance. In the *Ingram* case, a question remains under Texas law as to whether the divorced wife had abandoned the homestead. Assuming no abandonment, and if the wife discharges her personal income tax liability before the Government can proceed with its "sale," the District Court will be obliged to strike an equitable balance under the relevant factors. P. 712.

649 F. 2d 1117, reversed and remanded; 649 F. 2d 1128, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result in part and dissenting in part, in which REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 713.

George W. Jones argued the cause *pro hac vice* for the United States. On the briefs were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Stuart A. Smith*, *William S. Estabrook*, and *Wynette J. Hewett*.

Wm. D. Elliott argued the cause for respondents Rodgers et al. With him on the brief was *J. Michael Wylie*. *L. Lynn Elliott* argued the cause and filed a brief for respondents Ingram et al.

JUSTICE BRENNAN delivered the opinion of the Court.

These consolidated cases involve the relationship between the imperatives of federal tax collection and rights accorded by state property laws. Section 7403 of the Internal Revenue Code of 1954, 26 U. S. C. § 7403 (1976 ed. and Supp. V), authorizes the judicial sale of certain properties to satisfy the tax indebtedness of delinquent taxpayers. The issue in both cases is whether § 7403 empowers a federal district court to order the sale of a family home in which a delinquent taxpayer had an interest at the time he incurred his indebtedness, but in which the taxpayer's spouse, who does not owe any of that indebtedness, also has a separate "homestead" right as defined by Texas law. We hold that the statute does grant power to order the sale, but that its exercise is limited to some degree by equitable discretion. We also hold that, if the home *is* sold, the nondelinquent spouse is entitled, as part of the distribution of proceeds required under § 7403, to so much of the proceeds as represents complete compensation for the loss of the homestead estate.

I

A

Section 7403 provides in full as follows:

> "(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary [of the Treasury], may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any

> property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.
>
> "(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.
>
> "(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.
>
> "(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

As a general matter,[1] the "lien of the United States" referred to in § 7403(a) is that created by 26 U. S. C. § 6321, which provides:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any

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[1] See also 26 U. S. C. § 5004 (1976 ed. and Supp. V) (lien in case of tax on distilled spirits); § 6324 (special liens for estate and gift taxes).

> interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."[2]

Section 7403, whose basic elements go back to revenue legislation passed in 1868 (§106 of the Act of July 20, 1868, ch. 186, 15 Stat. 167) is one of a number of distinct enforcement tools available to the United States for the collection of delinquent taxes.[3] The Government may, for example, simply sue for the unpaid amount, and, on getting a judgment, exercise the usual rights of a judgment creditor. See 26 U. S. C. §§6502(a), 7401, 7402(a). Yet a third route is administrative levy under 26 U. S. C. §6331(a), which provides:

> "If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary [or his delegate] to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax . . . ."

Administrative levy, unlike an ordinary lawsuit, and unlike the procedure described in §7403, does not require any judicial intervention, and it is up to the taxpayer, if he so chooses, to go to court if he claims that the assessed amount was not legally owing. See generally *Bull* v. *United States*, 295 U. S. 247, 260 (1935).[4]

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[2] The validity and priority of a §6321 lien as against certain third parties with subsequently arising interests in the property or interests in property to which the lien has attached are governed by 26 U. S. C. §6323 (1976 ed. and Supp. V). See also 26 U. S. C. §6322 (period of lien); 26 U. S. C. §6325 (1976 ed. and Supp. V) (release of lien or discharge of property).

[3] See generally 4 B. Bittker, Federal Taxation of Income, Estates, and Gifts ¶111.5 (1981) (hereinafter Bittker); McGregor & Davenport, Collection of Delinquent Federal Taxes, Twenty-Eighth Inst. on Fed. Tax. 589 (1976).

The common purpose of this formidable arsenal of collection tools is to ensure the prompt and certain enforcement of the tax laws in a system relying primarily on self-reporting. See *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 350 (1977); *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51 (1950); *Bull* v. *United States*, *supra*, at 259–260.[5] Moreover, it has long been an axiom of our tax collection scheme that, although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law. See *United States* v. *Mitchell*, 403 U. S. 190, 205 (1971) (state law determines income attributable to wife as community property, but state law allowing wife to renounce community rights and obligations not effective as to liability for federal tax); *United States* v. *Union Central Life Insurance Co.*, 368 U. S. 291, 293–295 (1961) (federal tax lien not subject, even as against good-faith purchaser, to state filing requirements); *Aquilino* v. *United States*, 363 U. S. 509, 513–515 (1960), and cases cited (attachment of federal lien depends on whether "property" or "rights to property" exist under state law; priority of federal lien depends on federal law); *United States* v. *Bess*, 357 U. S. 51, 56–57 (1958) (once it has been determined that state law has created property interests sufficient for federal tax lien to attach, state law "is inoperative to prevent the attachment" of such liens); *Springer* v. *United States*, 102 U. S. 586, 594 (1881) (federal tax sale not subject to state requirement that independent lots be sold separately).

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[4] But cf. 26 U. S. C. § 6213 (1976 ed. and Supp. V) (relating to unpaid taxes attributable to a deficiency).

[5] See also *United States* v. *Bisceglia*, 420 U. S. 141, 145–146 (1975) (26 U. S. C. §§ 7601, 7602); *United States* v. *American Friends Service Committee*, 419 U. S. 7, 12 (1974) (Anti-Injunction Act, 26 U. S. C. § 7421).

B

The substance of Texas law related to the homestead right may usefully be divided into two categories. Cf. *Woods* v. *Alvarado State Bank*, 118 Tex. 586, 590, 19 S. W. 2d 35, 35 (1929). First, in common with a large number of States, Texas establishes the family home or place of business[6] as an enclave exempted from the reach of most creditors. Thus, under Tex. Const., Art. 16, § 50:

> "The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for [certain exceptions not relevant here] . . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for [certain exceptions not relevant here]."[7]

Second, in common with a somewhat smaller number of States, Texas gives members of the family unit additional rights in the homestead property itself. Thus, in a clause not included in the above quotation, Tex. Const., Art 16, § 50, also provides that "the owner or claimant of the property claimed as homestead [may not], if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law."[8] Equally important, Art. 16, § 52, provides:

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[6] Texas Const., Art. 16, § 51, provides in relevant part:

"[T]he homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars ['Five Thousand Dollars' before 1970], at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family."

See also Tex. Rev. Civ. Stat. Ann., Art. 3833 (Vernon Supp. 1982–1983). No claim seems to be made in these cases that the properties involved are not homesteads by virtue of having exceeded, at the time of designation, the monetary limit set out in the statute.

[7] See also Tex. Rev. Civ. Stat. Ann., Art. 3834 (Vernon 1966) (proceeds of voluntary sale of homestead not subject to garnishment or forced sale within six months after such sale); *Ingram* v. *Dallas Dept. of Housing & Urban Rehabilitation*, 649 F. 2d 1128, 1132, n. 6 (CA5 1981) (citing cases applying same rule to fire insurance proceeds).

> "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."[9]

The effect of these provisions in the Texas Constitution is to give each spouse in a marriage a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment, and which may not be compromised either by the other spouse or by his or her heirs.[10] It bears emphasis that the rights accorded by the homestead laws vest independently in each spouse regardless of whether one spouse, or both, actually owns the fee interest in the homestead. Thus, although analogy is somewhat hazardous in this area, it may be said that the homestead laws have the effect of reducing the underlying ownership rights in a homestead property to something akin to remainder interests and vesting in each spouse an interest akin to an undivided life estate in the property. See *Williams* v. *Williams*, 569 S. W. 2d 867, 869 (Tex. 1978), and cases cited; *Paddock* v. *Siemoneit*, 147 Tex. 571, 585, 218 S. W. 2d 428, 436 (1949), and cases cited; *Hill* v. *Hill*, 623 S. W. 2d 779, 780 (Tex. App. 1981), and cases cited. This analogy, although it does some injustice to the nuances present in the Texas homestead statute,[11] also serves to bring to the fore something that has been repeatedly emphasized by the Texas courts, and that was reaffirmed by the Court of Appeals in these cases: that the Texas homestead right is not a mere statutory entitlement, but a vested property right. As the Supreme Court of Texas has put it, a spouse "has a vested estate in the land of which she cannot be divested during her life except by abandonment or a voluntary conveyance in the manner prescribed by law." *Paddock* v. *Siemoneit*, *supra*, at 585, 218 S. W. 2d, at 436; see *United States* v. *Rogers*, 649 F. 2d 1117, 1127 (CA5 1981), and cases cited.[12]

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[8] See also Tex. Fam. Code Ann. §§ 5.81–5.86 (1975).

[9] See also Tex. Prob. Code Ann. §§ 283–285 (1980).

[10] The homestead character of property is not destroyed even by divorce, if one of the parties to the divorce continues to maintain the property as a proper homestead. See *Renaldo* v. *Bank of San Antonio*, 630 S. W. 2d 638, 639 (Tex. 1982); *Wierzchula* v. *Wierzchula*, 623 S. W. 2d 730, 732 (Tex. Civ. App. 1981). The courts may, however, partition the property, award it to one or the other spouse, or require one spouse to compensate the other, as part of the disposition of marital property attendant to the divorce proceedings. See *Hedtke* v. *Hedtke*, 112 Tex. 404, 248 S. W. 21 (1923); *Brunell* v. *Brunell*, 494 S. W. 2d 621, 622–623 (Tex. Civ. App. 1973).

II

The two cases before us were consolidated for oral argument before the United States Court of Appeals for the Fifth Circuit, and resulted in opinions issued on the same day. *United States* v. *Rogers*, *supra*;[13] *Ingram* v. *Dallas Dept. of*

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[11] See *Fiew* v. *Qualtrough*, 624 S. W. 2d 335, 337 (Tex. App. 1981) (homestead estate, because it can be lost through abandonment, is not identical to life estate; it nevertheless " 'partakes of the nature of an estate for life' ") (emphasis deleted).

[12] Moreover, a homestead estate is treated in Texas as property for which just compensation or its equivalent must be paid in case of condemnation by the State. *Lucas* v. *Lucas*, 104 Tex. 636, 143 S. W. 1153 (1912). Cf. *infra*, at 697–698.

[13] Mrs. Rodgers' name was misspelled in the complaint filed by the Government. See 649 F. 2d, at 1119, n. 1.

Housing & Urban Rehabilitation, 649 F. 2d 1128 (1981). They arise out of legally comparable, but quite distinct, sets of facts.

A

Lucille Mitzi Bosco Rodgers is the widow of Philip S. Bosco, whom she married in 1937. She and Mr. Bosco acquired, as community property, a residence in Dallas, Texas, and occupied it as their homestead. Subsequently, in 1971 and 1972, the Internal Revenue Service issued assessments totaling more than $900,000 for federal wagering taxes, penalties, and interest, against Philip for the taxable years 1966 through 1971. These taxes remained unpaid at the time of Philip's death in 1974. Since Philip's death, Lucille has continued to occupy the property as her homestead, and now lives there with her present husband.

On September 23, 1977, the Government filed suit under 26 U. S. C. §§ 7402 and 7403 in the United States District Court for the Northern District of Texas against Mrs. Rodgers and Philip's son, daughter, and executor. The suit sought to reduce to judgment the assessments against Philip, to enforce the Government's tax liens, including the one that had attached to Philip's interest in the residence, and to obtain a deficiency judgment in the amount of any unsatisfied part of the liability. On cross-motions for summary judgment, the District Court granted partial summary judgment on, among other things, the defendants' claim that the federal tax liens could not defeat Mrs. Rodgers' state-created right not to have her homestead subjected to a forced sale. Fed. Rule Civ. Proc. 54(b).

The Court of Appeals affirmed on the homestead issue,[14] holding that if "a homestead interest is, under state law, a property right, possessed by the nontaxpayer spouse at the time the lien attaches to the taxpayer spouse's interest, then the federal tax lien may not be foreclosed against the homestead property for as long as the nontaxpayer spouse maintains his or her homestead interest under state law." 649 F. 2d, at 1125 (footnotes omitted). The court implied that the Government had the choice of either waiting until Mrs. Rodgers' homestead interest lapsed, or satisfying itself with a forced sale of only Philip Bosco's interest in the property.

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[14] It reversed on an attorney's fees issue not now before us.

B

Joerene Ingram is the divorced wife of Donald Ingram. During their marriage, Joerene and Donald acquired, as community property, a residence in Dallas, Texas, and occupied it as their homestead. Subsequently, in 1972 and 1973, the Internal Revenue Service issued assessments against Donald Ingram relating to unpaid taxes withheld from wages of employees of a company of which he was president. Deducting payments made on account of these liabilities, there remains unpaid approximately $9,000, plus interest. In addition, in 1973, the Service made an assessment against both Donald and Joerene in the amount of $283.33, plus interest, relating to their joint income tax liability for 1971. These amounts also remain unpaid.

In March 1975, at about the time the Ingrams were seeking a divorce, their residence was destroyed by fire. In September 1975, the Ingrams obtained a divorce. In connection with the divorce, they entered into a property settlement agreement, one provision of which was that Donald would convey to Joerene his interest in the real property involved in this case in exchange for $1,500, to be paid from the proceeds of the sale of the property. Joerene tried to sell the property, through a trustee, but was unsuccessful in those efforts, apparently because of the federal tax liens encumbering the property. To make matters worse, she then received notice from the City of Dallas Department of Housing and Urban Rehabilitation (Department) that unless she complied with local ordinances, the remains of the fire-damaged residence would be demolished. Following a hearing, the Department issued a final notice and a work order to demolish. Joerene Ingram and the trustee then filed suit in Texas state court to quiet title to the property, to remove the federal tax liens, and to enjoin demolition. The defendants were the United States, the Department, and several creditors claiming an interest in the property.

The United States removed the suit to the District Court for the Northern District of Texas. It then filed a counterclaim against Joerene Ingram and Donald Ingram (who was added as a defendant on the counterclaim) for both the unpaid withholding taxes and the joint liability for unpaid income taxes. In its prayer for relief, the Government sought, among other things, judicial sale of the property under § 7403. Pursuant to a stipulation of the parties, the property was sold unencumbered and the proceeds (approximately $16,250) were deposited into the registry of the District Court pending the outcome of the suit. The parties agreed that their rights, claims, and priorities would be determined as if the sale had not taken place, and that the proceeds would be divided according to their respective interests. On cross-motions for summary judgment, the District Court granted summary judgment on the Government's counterclaims.

The Court of Appeals affirmed in part, and reversed and remanded in part. It agreed that the Government could foreclose its lien on the proceeds from the sale of the property to collect the $283.33, plus interest, for the unpaid income tax owed by Joerene and Donald Ingram jointly. Applying its decision in *Rodgers*, however, it also held that the Government could not reach the proceeds of the sale of the property to collect the individual liability of Donald Ingram, assuming Joerene Ingram had maintained her homestead interest in the property. The court remanded, however, for a factual determination of whether Joerene had "abandoned" the homestead by dividing the insurance proceeds with Donald and by attempting—even before the stipulation entered into with the Government—to sell the property and divide the proceeds of that sale with Donald.[15]

C

The Government filed a single petition for certiorari in both these cases. See this Court's Rule 19.4. We granted certiorari, 456 U. S. 904 (1982), in order to resolve a conflict among the Courts of Appeals as to the proper interpretation of § 7403.

III

A

The basic holding underlying the Court of Appeals' view that the Government was not authorized to seek a sale of the homes in which respondents held a homestead interest is that "when a delinquent taxpayer shares his ownership interest in property jointly with other persons rather than being the sole owner, his 'property' and 'rights to property' to which the federal tax lien attaches under 26 U. S. C. § 6321, and on which federal levy may be had under 26 U. S. C. § 7403(a), involve only his *interest* in the property, and not the entire property." 649 F. 2d, at 1125 (emphasis in original). According to the Court of Appeals, this principle applies, not only in the homestead context, but in any cotenancy in which unindebted third parties share an ownership interest with a delinquent taxpayer. See *Folsom* v. *United States*, 306 F. 2d 361 (CA5 1962).

We agree with the Court of Appeals that the Government's lien under § 6321 cannot extend beyond the property interests held by the delinquent taxpayer.[16] We also agree that the Government may not ultimately collect, as satisfaction for the indebtedness owed to it, more than the value of the property interests that are actually liable for that debt. But, in this context at least, the right to collect and the right to seek a forced sale are two quite different things.

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[15] The Court of Appeals did suggest that neither the fire nor the intention to sell the house would, in and of themselves, necessarily indicate an abandonment of the homestead. 649 F. 2d, at 1132, and n. 6; see n. 7, *supra*.

The Court of Appeals for the Fifth Circuit recognized that it was the only Court of Appeals that had adopted the view that the Government could seek the sale, under § 7403, of only the delinquent taxpayer's "*interest* in the property, and not the entire property." 649 F. 2d, at 1125, and n. 12. We agree with the prevailing view that such a restrictive reading of § 7403 flies in the face of the plain meaning of the statute. See, *e. g., United States* v. *Trilling*, 328 F. 2d 699, 702-703 (CA7 1964); *Washington* v. *United States*, 402 F. 2d 3, 6-7 (CA4 1968); *United States* v. *Overman*, 424 F. 2d 1142, 1146 (CA9 1970); *United States* v. *Kocher*, 468 F. 2d 503, 506-507 (CA2 1972); see also *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326, 339-341 (1890).[17]

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[16] Accord, *In re Carlson*, 580 F. 2d 1365, 1369 (CA10 1978); *Herndon* v. *United States*, 501 F. 2d 1219 (CA8 1974); *Economy Plumbing & Heating Co.* v. *United States*, 197 Ct. Cl. 839, 843, 456 F. 2d 713, 716 (1972); *United States* v. *Overman*, 424 F. 2d 1142, 1146 (CA9 1970); see *United States* v. *Bess*, 357 U. S. 51, 55-57 (1958); Bittker ¶ 111.5.4, at 111-102 ("the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out").

Of course, once a lien has attached to an interest in property, the lien cannot be extinguished (assuming proper filing and the like) simply by a transfer or conveyance of the interest. See generally 26 U. S. C. § 6323 (1976 ed. and Supp. V); *United States* v. *Bess*, *supra*, at 57. Thus, in these cases, liens still attach to the specific property interests transferred by Philip Bosco at his death, and conveyed by Donald Ingram as part of his divorce settlement with Joerene Ingram.

[17] In *Mansfield*, this Court held that the federal tax collector could not, by a sale pursuant to administrative levy, pass good title to property leased by a tax-delinquent distiller but owned by a third party, even though the third-party owner had previously signed a waiver giving the Government a first lien on the fee interest. "Any other construction would impute to

Section 7403(a) provides, not only that the Government may "enforce [its] lien," but also that it may seek to "subject *any property*, of whatever nature, of the delinquent, or *in which he has any right, title, or interest*, to the payment of such tax or liability" (emphasis added). This clause in and of itself defeats the reading proposed by the Court of Appeals.[18]

Congress the purpose, in order that the taxes against the delinquent distiller, having only a leasehold interest, might be collected, to seize and sell the interest of the owner of the fee, and to destroy the lien of an incumbrancer, without giving either an opportunity to be heard." 135 U. S., at 340. Cf. *infra*, at 695–696. The Court also noted, however, that

> "[i]n order to collect the taxes due from . . . the distiller, [the Government] might have instituted a suit in equity [under the predecessor statute to § 7403], to which not only the distiller, who had simply a leasehold interest, but *all persons* having liens upon, or claiming any interest in, the premises could be made parties; in which suit, it would have been the duty of the court to determine finally the merits of *all claims* to and liens upon the property, and to order a sale distributing the proceeds among the parties according to their respective interests." 135 U. S., at 339 (emphasis added).

Read broadly, *Mansfield* is on "all fours" with our holding today. Read more narrowly, it may be dependent on the fact of the waiver signed by the fee owners. See *id.*, at 339–340. The former reading is more plausible, but we do not rest our decision on it.

In denying even an ambiguity in *Mansfield*, *post*, at 721–722, the dissent in our view makes two errors. First, it pays insufficient attention to the general statement quoted above. Second, it ignores the full context of the language upon which it does rely. In context, that language suggests to us that the waiver obtained by the Government gave it, not the right to seek a sale of the entire property, but the right, *if* it sought a sale of the entire property, to gain access to the entire proceeds of the sale rather than merely the value of the leasehold interest once held by the taxpayer.

[18] The statutory language does pose one difficulty, not discussed or relied on by the Court of Appeals: It might be possible to read the phrase "to enforce the lien of the United States under this title . . . *or* to subject any property, of whatever nature, of the delinquent, or in which he *has* any right, title, or interest, to the payment of such tax or liability" (emphasis added), as suggesting that if a lien has attached to a delinquent taxpayer's interest in property, but the delinquent taxpayer has no *current* interest in that property, then the Government would have no power to seek the sale

Section 7403(b) then provides that "[a]ll persons having liens upon *or claiming any interest in the property involved in such action* shall be made parties thereto" (emphasis added). Obviously, no joinder of persons claiming independent interests in the property would be necessary if the Government were only authorized to seek the sale of the delinquent taxpayer's own interests. Finally, § 7403(c) provides that the district court should "determine the merits of *all* claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale *of such property . . . and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States*" (emphasis added). Again, we must read the statute

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of the entire property. This reading is plausible on its face, but there is no indication that Congress intended such a bifurcation, and there are no cases of which we are aware that support it. Cf. Bittker ¶ 111.5.5, at 111-107; see generally n. 16, *supra*. Moreover, the remainder of § 7403 does not appear to recognize such a distinction.

Drawing such a distinction would also make little sense as a policy matter. A third party holding a property interest to which no lien has attached has the same interests vis-à-vis the Government regardless of whether the concurrent property interest to which a lien *has* attached is still in the hands of the delinquent taxpayer, or has been conveyed to someone else.

Even if we were to adopt such an unprecedented reading of the statute, it might well make no difference in these cases. By virtue of 26 U. S. C. § 6901(a), § 7403(a) should actually be read to the effect that the Government may seek "to subject any property, of whatever nature, of the delinquent *or his liable transferee*, or in which he *or his liable transferee* has any right, title, or interest, to the payment of such tax or liability." See generally *Phillips* v. *Commissioner*, 283 U. S. 589 (1931); *Commissioner* v. *Stern*, 357 U. S. 39 (1958). Whether the present holders of the property interests to which tax liens have attached are liable transferees under § 6901(a) is determined by state law, see *Stern, supra*, at 42-45, but we do note that (1) Philip Bosco's interests seem now to be held by his estate or heirs, and (2) there may be some question as to whether the conveyance of Donald Ingram's interest to Joerene Ingram was for full value. See generally Bittker ¶ 111.5.7.

to contemplate, not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property (as long as the United States has any "claim or interest" in it), and the recognition of third-party interests through the mechanism of judicial valuation and distribution.

Our reading of § 7403 is consistent with the policy inherent in the tax statutes in favor of the prompt and certain collection of delinquent taxes. See *supra*, at 683. It requires no citation to point out that interests in property, when sold separately, may be worth either significantly more or significantly less than the sum of their parts. When the latter is the case, it makes considerable sense to allow the Government to seek the sale of the whole, and obtain its fair share of the proceeds, rather than satisfy itself with a mere sale of the part.

Our reading is also supported by an examination of the historical background against which the predecessor statute to § 7403 was enacted. In 1868, as today, state taxation consisted in large part of ad valorem taxation on real property. In enforcing such taxes against delinquent taxpayers, one usual remedy was a sale by the State of the assessed property. The prevailing—although admittedly not universal—view was that such sales were *in rem* proceedings, and that the title that was created in the sale extinguished not only the interests of the person liable to pay the tax, but also any other interests that had attached to the property, even if the owners of such interests could not otherwise be held liable for the tax. See generally H. Black, Law of Tax Titles §§ 231–236 (1888); W. Burroughs, Law of Taxation § 122 (1877). Where *in rem* proceedings were the rule, they were generally held to cut off as well dower or homestead rights possessed by the delinquent taxpayer's spouse. See *Lucas* v. *Purdy*, 142 Iowa 359, 120 N. W. 1063 (1909); *Robbins* v. *Barron*, 32 Mich. 36 (1875); *Jones* v. *Devore*, 8 Ohio St. 430 (1858); Black 299; Burroughs 348. But cf. R. Blackwell, Power to Sell Land for the Non-Payment of Taxes 550 (3d ed. 1869).

One evident purpose of the federal judicial sale provision enacted in 1868 was to obtain for the federal tax collector some of the advantages that many States enjoyed through *in rem* tax enforcement. As one commentator has put it, echoing almost exactly the usual description of state *in rem* proceedings, the § 7403 proceeding

> "from its very nature, is a proceeding in rem. The purchaser receives a complete new title and not just somebody's interest. The court finds the state of the title to the real estate in question, orders it sold if the United States has a lien on it, and divides the proceeds accordingly. All prior interests are cut off and the title starts over again in the new purchaser." Rogge, The Tax Lien of the United States, 13 A. B. A. J. 576, 577 (1927).

See also G. Holmes, Federal Income Tax 546–547 (1920).

Even as it gave the Government the right to seek an undivided sale in an *in rem* proceeding, however, the predecessor to § 7403 departed quite sharply from the model provided by the States by guaranteeing that third parties with an interest in the property receive a share of the proceeds commensurate with the value of their interests. This apparently unique provision was prompted, we can assume, by the sense that, precisely because the federal taxes involved were not taxes on the real property being sold, simple justice required significantly greater solicitude for third parties than was generally available in state *in rem* proceedings.[19]

Finally, our reading of the statute is significantly bolstered by a comparison with the statutory language setting out the administrative levy remedy also available to the Government.[20] Under 26 U. S. C. § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt "property and rights to property . . . *belonging to such person* [*i. e.*, the delinquent taxpayer] or on which there is a lien provided in this chapter for the payment of such tax" (emphasis added). This language clearly embodies the limitation that the Court of Appeals thought was present in § 7403, and it has been so interpreted by the courts.[21] Section 6331, unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331. Indeed, third parties whose property or interests in property have been seized inadvertently are entitled to claim that the property has been "wrongfully levied upon," and may apply for its return either through administrative channels, 26 U. S. C. § 6343(b), or through a civil action filed in a federal district court, § 7426(a)(1); see §§ 7426(b)(1), 7426(b)(2)(A).[22] In the absence of such "wrongful levy," the entire proceeds of a sale conducted pursuant to administrative levy may be applied, without any prior distribution of the sort required by § 7403, to the expenses of the levy and sale, the specific tax liability on the seized property, and the general tax liability of the delinquent taxpayer. 26 U. S. C. § 6342.

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[19] We should note, though, that some States, even outside the context of *in rem* proceedings to enforce property taxation, were not averse to seizing one person's property *without compensation* in order to satisfy the unrelated tax delinquency of another person. See, *e. g., Sears* v. *Cottrell*, 5 Mich. 251 (1858); *Hersee* v. *Porter*, 100 N. Y. 403, 3 N. E. 338 (1885). Cf. *International Harvester Credit Corp.* v. *Goodrich*, 350 U. S. 537 (1956).

We are not entirely unmoved by the force of the basic intuition underlying the Court of Appeals' view of § 7403—that the Government, though it has the "right to pursue the property of the [delinquent] taxpayer with all the force and fury at its command," should not have any right, superior to that of other creditors, to disturb the settled expectations of innocent third parties. *Folsom* v. *United States*, 306 F. 2d, at 367–368. In fact, however, the Government's right to seek a forced sale of the entire property in which a delinquent taxpayer had an interest does not arise out of its privileges as an ordinary creditor, but out of the express terms of § 7403. Moreover, the use of the power granted by § 7403 is not the act of an ordinary creditor, but the exercise of a sovereign prerogative, incident to the power to enforce the obligations of the delinquent taxpayer himself, and ultimately grounded in the constitutional mandate to "lay and collect taxes."[23] Cf. *Bull* v. *United States*, 295 U. S., at 259–260; *Phillips* v. *Commissioner*, 283 U. S. 589, 595–597 (1931); *United States* v. *Snyder*, 149 U. S. 210, 214–215 (1893).

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[20] See *Mansfield* v. *Excelsior Refining Co.*, 135 U. S., at 339–341; *National Bank & Trust Co. of South Bend* v. *United States*, 589 F. 2d 1298, 1303 (CA7 1978).

[21] See *Mansfield* v. *Excelsior Refining Co.*, *supra*, at 339–341, discussed in n. 17, *supra; National Bank & Trust Co. of South Bend* v. *United States*, *supra*, at 1303; *Herndon* v. *United States*, 501 F. 2d 1219, 1223 (CA8 1974); *Stuart* v. *Willis*, 244 F. 2d 925, 929 (CA9 1957); cf. S. Rep. No. 1708, 89th Cong., 2d Sess., 17 (1966).

[22] If the "wrongfully levied upon" property has already been sold, the third party may, of course, have to settle for monetary reimbursement. See 26 U. S. C. §§ 6343(b)(3), 7426(b)(2)(C).

Admittedly, if § 7403 allowed for the gratuitous confiscation of one person's property interests in order to satisfy another person's tax indebtedness, such a provision might pose significant difficulties under the Due Process Clause of the Fifth Amendment.[24] But, as we have already indicated, § 7403 makes no further use of third-party property interests than to facilitate the extraction of value from those concurrent property interests that *are* properly liable for the taxpayer's debt. To the extent that third-party property interests are "taken" in the process, § 7403 provides compensation for that "taking" by requiring that the court distribute the proceeds of the sale "according to the findings of the court in respect to the interests of the parties and of the United

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[23] U. S. Const., Art. I, § 8, cl. 1; Amdt. 16.

[24] But cf. cases cited in n. 19, *supra*.

If there were any Takings Clause objection to § 7403, such an objection could not be invoked on behalf of property interests that came into being after enactment of the provision. See *United States* v. *Security Industrial Bank*, 459 U. S. 70, 82 (1982). In both cases here, the homestead estates at issue came into being long after 1868.

States." Cf. *United States* v. *Overman*, 424 F. 2d, at 1146. Moreover, we hold, on the basis of what we are informed about the nature of the homestead estate in Texas, that it is the sort of property interest for whose loss an innocent third party must be compensated under § 7403. Cf. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377–378 (1945).[25] We therefore see no contradiction, at least at the level of basic principle, between the enforcement powers granted to the Government under § 7403 and the recognition of vested property interests granted to innocent third parties under state law.

The exact method for the distribution required by § 7403 is not before us at this time. But we can get a rough idea of the practical consequences of the principles we have just set out. For example, if we assume, *only for the sake of illustration*, that a homestead estate is the exact economic equivalent of a life estate, and that the use of a standard statutory or commerical table and an 8% discount rate is appropriate in calculating the value of that estate, then three nondelinquent surviving or remaining spouses, aged 30, 50, and 70 years, each holding a homestead estate, would be entitled to approximately 97%, 89%, and 64%, respectively, of the proceeds of the sale of their homes as compensation for that estate.[26] In addition, if we assume that each of these hypothetical nondelinquent spouses also has a protected half-interest in the underlying ownership rights to the property being sold,[27] then their total compensation would be approximately 99%, 95%, and 82%, respectively, of the proceeds from such sale.

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[25] We therefore reject the Government's contention at oral argument, Tr. of Oral Arg. 10, 17–18, that the homestead estate would be irrelevant to a distribution under § 7403, and that, assuming that the entire underlying ownership interest is liable for the delinquent taxes, see n. 27, *infra*, the Government would be entitled to the entire proceeds of the sale.

We also reject the Government's suggestion that the homestead estate held by respondent Rodgers was only contingent at the time that the federal tax lien attached to her husband's interests in her home, and is therefore subordinate to the tax lien. Reply Brief for United States 2, n. 2. The "probate homestead" provided for in Tex. Const., Art. 16, § 52, is clearly, with respect to outside creditors, only a continuation of the separate homestead rights vested in each spouse by Tex. Const., Art. 16, § 50. See *Norman* v. *First Bank & Trust*, 557 S. W. 2d 797, 802 (Tex. Civ. App. 1977).

In sum, the Internal Revenue Code, seen as a whole, contains a number of cumulative collection devices, each with its own advantages and disadvantages for the tax collector. Among the advantages of administrative levy is that it is quick and relatively inexpensive. Among the advantages of a § 7403 proceeding is that it gives the Federal Government the opportunity to seek the highest return possible on the forced sale of property interests liable for the payment of federal taxes. The provisions of § 7403 are broad and profound. Nevertheless, § 7403 is punctilious in protecting the vested rights of third parties caught in the Government's collection effort, and in ensuring that the Government not receive out of the proceeds of the sale any more than that to which it is properly entitled. Of course, the exercise in any particular case of the power granted under § 7403 to seek the forced sale of property interests other than those of the delinquent taxpayer is left in the first instance to the good sense and common decency of the collecting authorities. 26 U. S. C. § 7403(a). We also explore in Part IV of this opinion the nature of the limited discretion left to the courts in proceedings brought under § 7403. But that the power exists, and that it is necessary to the prompt and certain enforcement of the tax laws, we have no doubt.

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[26] The figures in text are based on the table appearing in Ark. Stat. Ann. § 50-705 (Supp. 1981). See also, *e. g.*, 26 CFR § 20.2031-10 (1982); Actuarial Publishing House, Inc., Commutation Columns and Valuation Factors Based on 1980 CSO Mortality Table (1981).

[27] In the cases before us, the Government argues that, under Texas law, the entire community property (*i. e.*, the underlying ownership interest that we have analogized to a remainder interest), rather than merely the delinquent spouse's half-interest in it, is liable for the indebtedness of the delinquent spouse. Reply Brief for United States 3; see Tex. Fam. Code Ann. § 5.61(c) (1975). The Court of Appeals did not address this issue, and we leave it open for determination on remand. See *Burks* v. *Lasker*, 441 U. S. 471, 486 (1979).

B

There is another, intermeshed but analytically distinguishable, ground advanced by the Court of Appeals and the respondents—and reiterated by the dissent—for denying the Government the right to seek the forced sale of property held as a homestead by a nondelinquent third party. Taken in itself, this view would hold that, even if § 7403 normally allows for the forced sale of property interests other than those directly liable for the indebtedness of the delinquent taxpayer, the special protections accorded by the exemption aspect of Texas homestead law, see *supra*, at 685–686, should immunize it from the reach of § 7403.

The Court of Appeals conceded that "the homestead interest of a *taxpayer* spouse, *i. e.*, that of one who himself has tax liability, clearly cannot by itself defeat [the enforcement under § 7403 of] a federal tax lien." 649 F. 2d, at 1121 (emphasis in original); see also 649 F. 2d, at 1132 (authorizing levy on proceeds in *Ingram* case to the extent of the $283.33 liability jointly owed by Mr. and Mrs. Ingram). This proposition, although not explicit in the Code, is clearly implicit in 26 U. S. C. § 6334(c) (relating to exemptions from levy),[28] and in our decisions in *United States* v. *Mitchell*, 403 U. S., at 204–205; *Aquilino* v. *United States*, 363 U. S., at 513–514; and *United States* v. *Bess*, 357 U. S., at 56–57, discussed *supra*, at 683. The Court of Appeals also held that, if the homestead interest under Texas law were "merely an exemption" without accompanying vested property rights, it would not be effective against the Federal Government in a § 7403 proceeding, even in the case of a *non*delinquent spouse. 649 F. 2d, at 1125. Nevertheless, the court concluded that, if the homestead estate *both* was claimed by a nondelinquent spouse *and* constituted a property right under state law, then it *would* bar the Federal Government from pursuing a forced sale of the entire property.

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[28] Section 6334(c) provides: "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by [§ 6334(a).]"

We disagree. If § 7403 is intended, as we believe it is, to reach the entire property in which a delinquent taxpayer has or had any "right, title, or interest," then state-created exemptions against forced sale should be no more effective with regard to the entire property than with regard to the "right, title, or interest" itself. Accord, *United States* v. *Overman*, 424 F. 2d, at 1145–1147; *Herndon* v. *United States*, 501 F. 2d 1219, 1223–1224 (CA8 1974) (Ross, J., concurring).[29] No exception of the sort carved out by the Court of Appeals appears on the face of the statute, and we decline to frustrate the policy of the statute by reading such an exception into it. Cf. *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 586–587 (1979); *United States* v. *Mitchell*, *supra*, at 205–206. Moreover, the Supremacy Clause[30]—which provides the underpinning for the Federal Government's right to sweep aside state-created exemptions in the first place—is as potent in its application to innocent bystanders as in its application to delinquent debtors. See *United States* v. *Union Central Life Insurance Co.*, 368 U. S., at 293–295 (federal tax lien good against bona fide purchaser, even though lien not filed in accordance with provisions of state law); cf. *Hisquierdo* v. *Hisquierdo*, *supra*, at 585–586; *United States* v. *Carmack*, 329 U. S. 230, 236–

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[29] The Court of Appeals claimed that its view was consistent with that of the Tenth Circuit in *United States* v. *Hershberger*, 475 F. 2d 677 (1973). *Hershberger* does bear similarities to the Fifth Circuit's analysis, particularly in the distinction it draws between the two different types of homestead rights, and in its adoption of an absolute rule against certain forced sales. As we read *Hershberger*, however, it relies on an equitable analysis rather than on the inherent force of state homestead law to defeat a sale of entire property under § 7403. *Id.*, at 679.

[30] U. S. Const., Art. VI, cl. 2.

240 (1946). Whatever property rights attach to a homestead under Texas law are adequately discharged by the payment of compensation, and no further deference to state law is required, either by § 7403 or by the Constitution.

The dissent urges us to carve out an exception from the plain language of § 7403 in that "small number of joint-ownership situations . . . [in which] the delinquent taxpayer has no right to force partition or otherwise to alienate the entire property without the consent of the co-owner." *Post*, at 715. Its primary argument in favor of such an exception is that it would be consistent with traditional limitations on the rights of a lienholder. *Post*, at 713–715, 723–724. If § 7403 truly embodied traditional limitations on the rights of lienholders, however, then we would have to conclude that *Folsom* v. *United States*, 306 F. 2d 361 (CA5 1962), discussed *supra*, at 690, 696–697, was correctly decided, a proposition that even the dissent is not willing to advance. See *post*, at 713, 714, n. 2, 726. More importantly, we believe that the better analogy in this case is not to the traditional rights of lienholders, but to the traditional powers of a taxing authority in an *in rem* enforcement proceeding. See *supra*, at 694–695.[31]

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[31] In addition to its reliance on the traditional limitations imposed on lienholders, which we discuss in text, and on its reading of *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326 (1890), which we discuss in n. 17, *supra*, the dissent makes a number of additional arguments which require at least a brief response. First, it claims that the weight of authority is on its side. *Post*, at 717–718, and nn. 6, 7. The dissent's use of sources largely overlooks, however, the important distinction between the power of sale under § 7403 on the one hand and the extent of the underlying lien and the power of administrative levy on the other. See *supra*, at 690–691, and n. 16, 695–696, and nn. 20, 21. For example, only one of the five cases cited in the dissent's n. 7 deals with § 7403. Three of the five deal with administrative levy, and are therefore entirely consistent with the views we express in this opinion, and one concerns a judicial foreclosure conducted in state court without the benefit of § 7403. Moreover, the one case that does deal with § 7403, *United States* v. *Hershberger*, *supra*, gives only meager support to the dissent's position. See n. 29, *supra*. Similarly, not one of the secondary sources cited in the dissent's n. 6

IV

A

Although we have held that the Supremacy Clause allows the federal tax collector to convert a nondelinquent spouse's

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focuses on § 7403, and most merely report the line of administrative levy cases with which we are in agreement.

Second, the dissent relies on a piece of 1954 legislative history concerning the application of the federal tax lien to interests in tenancies by the entirety. *Post*, at 719–720. Quite apart from the fact that the dissent's argument depends on events taking place almost a century after enactment of the statute at issue, it suffers from two further serious flaws.

(1) The question at issue in 1954 bears only the most tangential relationship to that at issue here. The amendments at issue in 1954 did not concern § 7403. More important, tenancies by the entirety pose a problem quite distinct from that at issue in the case of homestead rights. See *Herndon* v. *United States*, 501 F. 2d, at 1220–1221; W. Plumb, Federal Tax Liens 37–38 (3d ed. 1972). The basic holding of the line of cases mentioned by the dissent was, not merely that interests in a tenancy by the entirety could not be sold to satisfy a tax debt of one spouse, but that, as a result of the peculiar legal fiction governing tenancies by the entirety in some States, no tax lien could attach in the first place because neither spouse possessed an independent interest in the property. See, *e. g.*, *United States* v. *American National Bank of Jacksonville*, 255 F. 2d 504, 506 (CA5 1958); *United States* v. *Hutcherson*, 188 F. 2d 326, 331 (CA8 1951). Indeed, in most of the cases in this line, the Government was *not* trying to sell the property out from under the nondelinquent spouse, but was merely trying to exercise one of the more benign rights of a lienholder to which the dissent would automatically relegate the Government in this case. In the homestead context, by contrast, there is no doubt, even under state law, that not only do *both* spouses (rather than neither) have an independent interest in the homestead property, but that a federal tax lien can at least *attach* to each of those interests. See *Paddock* v. *Siemoneit*, 147 Tex. 571, 584–585, 218 S. W. 2d 428, 436 (1949). Thus, *if* the tenancy by the entirety cases are correct, they do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place. See *supra*, at 683.

(2) Even if the 1954 legislative history cited by the dissent were relevant to the issues in these cases, our reading of the pertinent Committee Reports suggests to us, not that "the Senate foiled an attempt by the House to *extend* the reach of federal tax liens to tenancies by the entirety," *post*,

homestead estate into its fair cash value, and that such a conversion satisfies the requirements of due process, we are not blind to the fact that in practical terms financial compensation may not always be a completely adequate substitute for a roof over one's head. Cf. *United States* v. *564.54 Acres of Land*, 441 U. S. 506, 510–513 (1979). This problem seems particularly acute in the case of a homestead interest. First, the nature of the market for life estates or the market for rental property may be such that the value of a homestead interest, calculated as some fraction of the total value of a home, would be less than the price demanded by the market for a lifetime's interest in an equivalent home. Second, any calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics, and will unavoidably undercompensate persons who end up living longer than the average.[32] Indeed, it is precisely because of problems such as these that a number of courts, in eminent domain cases involving property divided between a homestead interest and underlying ownership rights or between a life estate and a remainder interest, have refused to distribute the pro-

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at 719 (emphasis added), but that the House sought to "*clarif[y]* the term 'property and rights to property' by *expressly* including therein the interest of the delinquent taxpayer in an estate by the entirety," H. R. Rep. No. 1337, 83d Cong., 2d Sess., A406 (1954) (emphasis added), and that the Senate rejected that clarification, not necessarily because it disagreed with it, but more likely because it found it superfluous, see S. Rep. No. 1622, 83d Cong., 2d Sess., 575 (1954) ("It is not clear what change in existing law would be made by the parenthetical phrase [suggested by the House]. The deletion of the phrase is intended to continue the existing law").

Finally, the dissent argues that our reading of § 7403 is rendered less likely by the fact that "[p]rior to 1936, . . . the predecessor of § 7403(c) *required* a court at the Government's request to sell the property in which the tax debtor had an interest." *Post*, at 723–724. As we make clear in our discussion of the may/shall issue, *infra*, at 706–709, however, we are not at all convinced that a sale of the undivided property was mandatory even prior to 1936.

[32] See 1 L. Orgel, Valuation Under the Law of Eminent Domain § 118, p. 511 (2d ed. 1953) (hereinafter Orgel).

ceeds according to an actuarial formula, and have instead placed the entire award in trust (or reinvested it in a new parcel of property) with the income (or use) going to the life-estate holder during his or her lifetime, and the corpus vesting in the holder of the remainder interest upon the death of the life-estate holder.[33]

If the sale and distribution provided for in § 7403 were mandatory, the practical problems we have just described would be of little legal consequence. The statute provides, however, that the court in a § 7403 proceeding "*shall* . . . proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, *may* decree a sale of such property . . ." (emphasis added), and respondents argue that this language allows a district court hearing a § 7403 proceeding to exercise a degree of equitable discretion and refuse to authorize a forced sale in a particular case. See *Tillery* v. *Parks*, 630 F. 2d 775 (CA10 1980); *United States* v. *Eaves*, 499 F. 2d 869, 870–871 (CA10 1974); *United States* v. *Hershberger*, 475 F. 2d, at 679–680; *United States* v. *Overman*, 424 F. 2d, at 1146; *United States* v. *Morrison*, 247 F. 2d 285, 289–291 (CA5 1957). The Court of Appeals agreed with this interpretation of the statute, although it does not appear to have relied on it, 649 F. 2d, at 1125, and in any event neither it nor the District Court undertook any particularized equitable assessment of the cases now before us. We find the question to be close, but on balance, we too conclude that § 7403 does not require a district court to authorize a forced sale under absolutely all circumstances, and that some limited room is left in the statute for the exercise of reasoned discretion.

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[33] See, *e. g.*, *United States* v. *403.15 Acres of Land*, 316 F. Supp. 655, 657–658 (MD Tenn. 1970); *United States* v. *380 Acres of Land*, 47 F. Supp. 6 (WD Ky. 1942); *Bonner* v. *Peterson*, 44 Ill. 253, 259 (1867); *In re Camp*, 126 N. Y. 377, 27 N. E. 799 (1891); *Redevelopment Comm'n of Greenville* v. *Capehart*, 268 N. C. 114, 118, 150 S. E. 2d 62, 65 (1966); *Lucas* v. *Lucas*, 104 Tex., at 641–642, 143 S. W., at 1155–1156 (condemnation of homestead).

But cf., *e. g.*, *United States* v. *818.76 Acres of Land*, 310 F. Supp. 210 (WD Mo. 1969); *Brugh* v. *White*, 267 Ala. 575, 103 So. 2d 800 (1957); *School District of Columbia* v. *Jones*, 229 Mo. 510, 129 S. W. 705 (1910); *Aue* v. *State*, 77 S. W. 2d 606 (Tex. Civ. App. 1934), all allowing apportionment.

See generally A. Jahr, Law of Eminent Domain: Valuation and Procedure § 129 (1953); 4 J. Sackman, Nichols' Law of Eminent Domain § 12.46[1] (3d ed. 1980); 1 Orgel § 118.

B

The word "may," when used in a statute, usually implies some degree of discretion.[34] This common-sense principle of statutory construction is by no means invariable, however, see *Mason* v. *Fearson*, 9 How. 248, 258–260 (1850); see generally *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 359–360 (1895), and cases cited, and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute, see *ibid.*

In these cases, we have little to go on in discerning Congress' intent except for one crucial fact: before 1936, the predecessor statute to § 7403 used the word "shall" rather than the word "may" in describing the court's role in ordering a forced sale of property in which a claim or interest of the United States had been shown. Revenue Act of 1926, Pub. L. 20, § 1127, 44 Stat. (part 2) 9, 123–124. In 1936, as one of a number of amendments in the text of the provision, Congress changed "shall" to "may." Revenue Act of 1936, Pub. L. 740, § 802, 49 Stat. 1648, 1743–1744. The other charges—specifically, expanding the scope of § 7403 to include personal as well as real property, and adding the receivership option now embodied in § 7403(d), see *supra*, at 681—are explained in the legislative history.[35] There is no direct explanation for the change from "shall" to "may."[36]

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[34] See *Haig* v. *Agee*, 453 U. S. 280, 294, n. 26 (1981); *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947); *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 662–663 (1923); *Thompson* v. *Lessee of Carroll*, 22 How. 422, 434 (1860).

The Government argues that the only significance of the change from "shall" to "may" was that "Congress recognized it had specifically authorized sale of interests in property, sale of the entire property, and receivership. Employing the term 'shall' with respect to each may have been perceived as confusing insofar as it could be read as directing contradictory requirements." Reply Brief for United States 8, n. 5.

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[35] The 1936 provision was introduced in the Senate as a committee-approved floor amendment to a comprehensive revenue bill originating in the House. 80 Cong. Rec. 9072 (1936). Its origins can be traced, however, to an earlier unpassed House bill seeking to amend certain administrative features of the tax laws. See H. R. 12793, 74th Cong., 2d Sess. (1936). The impetus for the provision, as explained in the House Report accompanying the earlier bill, was that the only then-existing remedy for the enforcement of tax liens against personal property was administrative levy, which in certain cases caused considerable hardship to both the taxpayer and the Government. The receivership option now contained in § 7403(d) was similarly conceived as a means of avoiding undue disruption of ongoing concerns whose assets were seized as part of a tax enforcement effort. See H. R. Rep. No. 2818, 74th Cong., 2d Sess., 7–8 (1936).

[36] Virtually the only difference between the earlier House version and the floor amendment introduced in the Senate was the crucial substitution of "may" for "shall" in the descriptions of both the court's power to order a forced sale and its power to appoint a receiver. The sponsor of the floor amendment, however, only had the following to say about its significance:

> "Mr. President, this amendment would permit the collector of internal revenue to apply to the United States courts, to file a petition in equity to enforce a lien for taxes where he has reason to believe the taxpayer will not be able to meet his obligations, and where public interest will be prejudiced by resorting to the provisions in the present law, for distraint on the taxpayer's assets. In other words, it is an amendment more favorable to the taxpayer than are the provisions of the present law." 80 Cong. Rec., at 9072 (Sen. Walsh).

Although the last sentence of Senator Walsh's comments might, taken out of context, be read to refer to the change from "shall" to "may," we think it more likely that he was referring to the same concerns that motivated the earlier House version.

We find this explanation plausible, but not compelling. If Congress had really meant no more than to adjust the forced sale language to take into account the receivership option, it could have easily expressed that intention more clearly by language to the effect of "the court *shall either* decree the sale of such property . . . *or*, upon the instance of the United States, appoint a receiver to enforce the lien, etc." Moreover, the authors of an earlier, unpassed, otherwise virtually identical proposal introduced in the House, did not think it necessary to change "shall" to "may" in their version of the legislation. See nn. 35, 36, *supra*.

Faced as we are with such an ambiguous legislative record, we come to rest with the natural meaning of the language enacted into law. In light of the fact that Congress did see fit to explain the other changes in the 1936 Act, we do not assert that Congress, without comment or explanation, intended to create equitable discretion where none existed before. On the other hand, there is support in our prior cases for the proposition that an unexplained change in statutory wording from "shall" to "may" is best construed as indicating a congressional belief that equitable discretion existed all along. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635 (1941); cf. *Haig* v. *Agee*, 453 U. S. 280, 294, n. 26 (1981).

In addition, reading "may" as either conferring or confirming a degree of equitable discretion conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion. *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982); *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946); *Hecht Co.* v. *Bowles*, 321 U. S. 321, 330 (1944). A § 7403 proceeding is by its nature a proceeding in equity,[37] and judicial sales in general have traditionally been accompanied by at least a limited degree of judicial discretion.[38]

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[37] This is even clearer in the statutory language as it existed prior to 1954: "In any case where there has been a refusal or neglect to pay any tax,

Finally, we are convinced that recognizing that district courts may exercise a degree of equitable discretion in § 7403 proceedings is consistent with the policies of the statute: unlike an absolute exception, which we rejected above, the exercise of limited equitable discretion in individual cases can take into account both the Government's interest in prompt and certain collection of delinquent taxes and the possibility that innocent third parties will be unduly harmed by that effort.

C

To say that district courts need not always go ahead with a forced sale authorized by § 7403 is not to say that they have unbridled discretion. We can think of virtually no circumstances, for example, in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself.[39] And even when the interests of third parties are involved, we think that a

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. . . the Attorney General at the request of the Commissioner of Internal Revenue may *direct a bill in chancery to be filed* . . . ." See Revenue Act of 1936, Pub. L. 740, § 802, 49 Stat. 1648, 1743–1744 (emphasis added). The language used in the 1954 Code was presumably adopted to conform to Federal Rule of Civil Procedure 2, but it was not intended to effect any material change from previous law. See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A431 (1954).

[38] See, *e. g., Semmes Nurseries, Inc.* v. *McDade*, 288 Ala. 523, 530–531, 263 So. 2d 127, 132–133 (1972); *Thomas* v. *Klein*, 99 Idaho 105, 107, 577 P. 2d 1153, 1155 (1978); *National Bank of Washington* v. *Equity Investors*, 81 Wash. 2d 886, 924–927, 506 P. 2d 20, 43–44 (1973).

The analogy to other types of judicial sales is strained somewhat by the fact that most ordinary judicial sales do not implicate the interests of third parties with independent possessory rights in the property being sold. This difference, however, only strengthens the case for the existence of judicial discretion in § 7403 proceedings.

[39] This is not to say that a forced sale may not be temporarily postponed, or made subject to an upset price, in order to do justice in an individual case.

certain fairly limited set of considerations will almost always be paramount.

First, a court should consider the extent to which the Government's financial interests would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes. Even the Government seems to concede that, if such a partial sale would not prejudice it at all (because the separate market value of the partial interest is likely to be equal to or greater than its value as a fraction of the total value of the entire property) then there would be no reason at all to authorize a sale of the entire property. Tr. of Oral Arg. 7, 13; Reply Brief for United States 8, n. 5.[40] We think that a natural extension of this principle, however, is that, even when the partial interest would be worth *less* sold separately than sold as part of the entire property, the possibility of prejudice to the Government can still be measured as a matter of degree. Simply put, the higher the expected market price, the less the prejudice, and the less weighty the Government's interest in going ahead with a sale of the entire property.[41]

Second, a court should consider whether the third party with a nonliable separate interest in the property would, in the normal course of events (leaving aside § 7403 and eminent domain proceedings, of course), have a legally recognized expectation that that separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors. If there is no such expectation, then there would seem to be little reason not to authorize the sale. Again, however, this factor is amenable to considerations of degree. The Texas homestead laws are almost absolute in their protections against forced sale.[32] The usual cotenancy arrangement, which allows any cotenant to seek a judicial sale of the property and distribution of the proceeds, but which also allows the other cotenants to resist the sale and apply instead for a partition in kind, is further along the continuum. And a host of other types of property interests are arrayed between and beyond.

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[40] There would also be no prejudice to the Government if the proceeds from the sale of the partial interest, even though they might be less than the value of the partial interest as a fraction of the total value of the entire property, would still be more than enough to satisfy the delinquent taxpayer's indebtedness, or if the taxpayer's indebtedness could be satisfied out of other property to which he had sole and complete title. In the former case, however, a court might still have to strike an equitable balance between the interests of the delinquent taxpayer and the interests of the nondelinquent third party.

[41] The prejudice to the Government of forgoing an immediate sale of the entire property might also be considered fairly minimal if the third-party interest at stake could be expected to lapse in the relatively near future.

Third, a court should consider the likely prejudice to the third party, both in personal dislocation costs and in the sort of practical undercompensation described *supra*, at 704–705.

Fourth, a court should consider the relative character and value of the nonliable and liable interests held in the property: if, for example, in the case of real property, the third party has no present possessory interest or fee interest in the property, there may be little reason not to allow the sale; if, on the other hand, the third party not only has a possessory interest or fee interest, but that interest is worth 99% of the value of the property, then there might well be virtually no reason to allow the sale to proceed.

We do not pretend that the factors we have just outlined constitute an exhaustive list; we certainly do not contemplate that they be used as a "mechanical checklist" to the exclusion of common sense and consideration of special circumstances. Cf. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 16 (1983). We do emphasize, however, that the limited discretion accorded by § 7403 should be exercised rigorously and sparingly, keeping in mind the Government's paramount interest in prompt and certain collection of delinquent taxes.

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[32] But cf. n. 10, *supra*.

V

In these cases, no individualized equitable balance of the sort we have just outlined has yet been attempted. In the *Rodgers* case, the record before us, although it is quite clear as to the legal issues relevant to the second consideration noted above, affords us little guidance otherwise. In any event, we think that the task of exercising equitable discretion should be left to the District Court in the first instance.

The *Ingram* case is a bit more complicated, even leaving aside the fact of the stipulated sale by which we are constrained to treat the escrow fund now sitting in the registry of the District Court as if it were a house. First, as the Court of Appeals pointed out, there remains a question under Texas law as to whether Joerene Ingram abandoned the homestead by the time of the stipulated sale. Second, the Government, in addition to its lien for the individual debt of Donald Ingram, has a further lien for $283.33, plus interest, on the house, representing the joint liability of Donald and Joerene Ingram. Because Joerene Ingram is not a "third party" as to that joint liability, we can see no reason, as long as that amount remains unpaid, not to allow a "sale" of the "house" (*i. e.*, a levy on the proceeds of the stipulated sale) for satisfaction of the debt. Moreover, once the dam is broken, there is no reason, under our interpretation of § 7403, not to allow the Government also to collect on the individual debt of Donald Ingram *out of that portion of the proceeds of the sale representing property interests properly liable for the debt.* On the other hand, it would certainly be to Mrs. Ingram's advantage to discharge her personal liability before the Government can proceed with its "sale," in which event, assuming that she has not abandoned the homestead, the District Court will be obliged to strike an equitable balance on the same general principles as those that govern the *Rodgers* case.

The judgment of the Court of Appeals in *Rodgers* is reversed, its judgment in *Ingram* is vacated, and both cases are remanded with directions that they be remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR join, concurring in the result in part and dissenting in part.

The Court today properly rejects the broad legal principle concerning 26 U. S. C. § 7403 that was announced by the Court of Appeals. See *ante*, at 687–688 and 690–691. I agree that, in some situations, § 7403 gives the Government the power to sell property *not* belonging to the taxpayer. Our task, however, is to ascertain how far Congress intended that power to extend. In my view, § 7403 confers on the Government the power to sell or force the sale of jointly owned property only insofar as the *tax debtor's* interest in that property would permit *him* to do so; it does not confer on the Government the power to sell jointly owned property if an unindebted co-owner enjoys an *indestructible* right to bar a sale and to continue in possession. Because Mrs. Rodgers had such a right, and because she is not herself indebted to the Government, I dissent from the Court's disposition of her case.

I

It is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; that is, the lienholder does no more than step into the debtor's shoes. 1 L. Jones, Law of Liens § 9, pp. 9–10 (1914). Thus, as a general rule, "[t]he lien of a judgment . . . cannot be made effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated." 49 C. J. S., Judgments § 478 (1947) (collecting cases); *Commercial Credit Co.* v. *Davidson*, 112 F. 2d 54, 57 (CA5 1940); *Wiltshire* v. *Warburton*, 59 F. 2d 611, 614 (CA4 1932). Similarly, pursuant to a state tax lien, "no greater interest in land than that which was held by the taxpayer and taxable to him may be sold, so that, where a sale is had for unpaid taxes on a leasehold estate, only the leasehold estate is subject to conveyance."[1] 85 C. J. S., Taxation § 806 (1954) (footnote omitted) (collecting cases); *United States* v. *Erie County*, 31 F. Supp. 57, 60 (WDNY 1939). The lienholder may compel the debtor to exercise his property rights in order to meet his obligations or the lienholder may exercise those rights for him. But the debtor's default does not vest in the lienholder rights that were not available to the debtor himself.

In most situations in which a delinquent taxpayer shares property with an unindebted third party, it does no violence to this principle to order a sale of the entire property so long as the third party is fully compensated. A joint owner usually has at his disposal the power to convey the property or force its conveyance. Thus, for example, a joint tenant or tenant in common may seek partition. See generally W. Plumb, Federal Tax Liens 35 (3d ed. 1972). If a joint tenant is delinquent in his taxes, the United States does no more than step into the delinquent taxpayer's shoes when it compels a sale.[2]

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[1] See *infra*, at 726–728.

[2] "Every jurisdiction permits partition by sale in a proper case." 4A R. Powell, Real Property ¶ 613, p. 655 (1982). The same treatise observes: "Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish it or because courts are easily convinced that sale is necessary for the fair treatment of the parties." ¶ 612, p. 652. The Government views application of § 7403 as constrained by like principles. Tr. of Oral Arg. 7; see *id.*, at 13; n. 14, *infra*.

Thus, stepping into the shoes of the tenant in common or joint tenant, the Government may force a sale of the entire property where sale is necessary for fair treatment of the parties or where the parties desire it. For these reasons, I agree with the Court that the Court of Appeals in these cases erred in relying on *Folsom* v. *United States*, 306 F. 2d 361 (CA5 1962), which held that the Government cannot seek the sale of jointly owned property, even when the tax debtor's rights in the property include the right to partition the property or seek a forced sale. See *id.*, at 365.

In a small number of joint-ownership situations, however, the delinquent taxpayer has no right to force partition or otherwise to alienate the entire property without the consent of the co-owner. These include tenancies by the entirety and certain homestead estates. See Plumb, Federal Liens and Priorities—Agenda for the Next Decade II, 77 Yale L. J. 605, 634 (1968). In this case, the homestead estate owned by the delinquent taxpayer—Mrs. Rodgers' deceased husband—did not include the right to sell or force the sale of the homestead during Mrs. Rodgers' lifetime without her consent. Mrs. Rodgers had, and still has, an indefeasible right to possession, an interest, as the Court recognizes, "akin to an undivided life estate." *Ante*, at 686. A lienholder stepping into the shoes of the delinquent taxpayer would not be able to force a sale.

II

By holding that the District Court has the discretion to order a sale of Mrs. Rodgers' property, the Court necessarily finds in the general language of § 7403 a congressional intent to abrogate the rule that the tax collector's lien does not afford him rights in property in excess of the rights of the delinquent taxpayer.[3] I do not dispute that the general language of § 7403, standing alone, is subject to the interpretation the Court gives it. From its enactment in 1868[4] to the present day, the language of this statute has been sweeping; read literally, it admits of no exceptions. But when broadly worded statutes, particularly those of some antiquity, are in derogation of common-law principles, this Court has hesitated to heed arguments that they should be applied literally. See *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976). In such cases, the Court has presumed in the absence of a clear indication to the contrary that Congress did not mean by its use of general language to contravene fundamental precepts of the common law.[5]

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[3] In the Court's words, when the Government exercises its "right to seek a forced sale" under § 7403, *ante*, at 691, Congress means it to walk not in the tax debtor's shoes, but in the full panoply of "sovereign prerogative." *Ante*, at 697. Yet the Court recognizes that the common-law principle limiting the property rights of the lienholder to those of the debtor long has been assumed in the federal law of tax liens. *Ante*, at 690–691, and n. 16, quoting 4 B. Bittker, Federal Taxation of Income, Estates, and Gifts ¶ 111.5.4, p. 111-102 (1981) ("the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out"). See Anderson, Federal Tax Liens—Their Nature and Priority, 41 Calif. L. Rev. 241, 250 (1953) ("The rights of the Government to the taxpayer's property under a tax lien are no greater than the rights of the taxpayer. Or, to put it more simply, the tax collector stands in the shoes of the taxpayer when reaching the taxpayer's property"); Reid, Tax Liens, Their Operation and Effect, New York University Ninth Annual Institute on Federal Taxation 563, 568 (1951) ("It is clear, of course, that the government's rights as lienor are no greater than

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the rights of the tax-debtor"); Clark, Federal Tax Liens and Their Enforcement, 33 Va. L. Rev. 13, 17 (1947) ("It is obvious, of course, that the federal tax lien can only reach the property of its tax-debtor and that [the Government's] rights as lienor to property or rights to property of its tax-debtor can rise no higher than the rights of the latter in that property or rights to property").

[4] Much like the current § 7403, the initial version authorized suit by the Commissioner "to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax." Act of July 20, 1868, ch. 186, § 106, 15 Stat. 125, 167.

[5] Despite the absolute language of 42 U. S. C. § 1983, the Court has concluded that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976). The Court has assumed that "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981). Pursuant to this approach, the Court has applied various common-law immunities to § 1983 actions. See, *e. g.*, *Briscoe* v. *LaHue*, 460 U. S. 325 (1983) (witnesses); *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982) (President); *Imbler* v. *Pachtman*, *supra* (state prosecutor); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (state executive officers); *Pierson* v. *Ray*, 386 U. S. 547 (1967) (state judge); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951) (state legislator).

Similarly, in *United States* v. *Sanges*, 144 U. S. 310, 322–323 (1892), the Court refused to permit the Government to appeal an adverse judgment in

A

Apart from the general language of the statute, the Court points to nothing indicating a congressional intent to abrogate the traditional rule. It seems to me, indeed, that the evidence definitely points the other way. Scholarly comment on § 7403, and on § 6321, the tax lien provision, consistently has maintained that, in States such as Texas that confer on each spouse absolute rights to full use and possession of the homestead for life, the homestead property rights of an unindebted spouse may not be sold by the tax collector to satisfy the other spouse's tax debt.[6] Court decisions address-

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a criminal case, despite a statute conferring appellate jurisdiction "[i]n any case that involves the construction or application of the Constitution of the United States," Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827, 828. The Court declared: "This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law," 144 U. S., at 311, which disfavored such appeals. Before it would conclude that Congress intended to legislate in derogation of a basic common-law rule, the Court required a specific expression of intent.

The concerns underlying the rule that the lienholder gains only the property rights of the debtor are as basic as those underlying the rules in *Sanges* and the § 1983 immunity cases. The taking of one person's indefeasible property rights to pay another person's debts, even with compensation, strikes a discordant note. Cf. *Hoeper* v. *Tax Comm'n*, 284 U. S. 206 (1931) (uncompensated taking of wife's property to pay husband's tax debt violates Due Process and Equal Protection Clauses of Fourteenth Amendment); *id.*, at 219 (Holmes, J., dissenting). The question here, as in *Sanges* and the § 1983 cases, is whether Congress intended this statute to reach that far. It is a well-recognized rule of statutory construction, flowing from a strong policy of respecting traditional property rights, that legislative grants of the takings power may be found in legislation only by express provision or necessary implication. See 3 C. Sands, Sutherland on Statutes and Statutory Construction § 64.06 (4th ed. 1974) (collecting cases); cf. *United States* v. *Wilson*, 420 U. S. 332, 336 (1975) (*Sanges* based on common-law rule of construction requiring explicit legislative authorization for state appeal in criminal case). As shown below, neither may be found in the language, policies, or legislative history of § 7403.

[6] See W. Plumb, Federal Tax Liens 38 (3d ed. 1972); American Bar Association, Report of the Special Committee on Federal Liens, 84 A. B. A.

ing this point have been to the same effect.[7] In 1966, the American Bar Association placed before Congress this virtually undisputed view of the law of federal tax liens. Legislative History 177.[8] Since 1936, Congress repeatedly has ad-

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Rep. 645, 682 (1959); Anderson, *supra* n. 3, at 254; Clark, *supra* n. 3, at 17; Plumb, Federal Liens and Priorities—Agenda for the Next Decade II, 77 Yale L. J. 605, 634, and n. 194 (1968); Plumb, Federal Tax Collection and Lien Problems, pt. 1, 13 Tax L. Rev. 247, 262–263 (1958); Reid, *supra* n. 3, at 568. Mr. Plumb's views may be due particular attention, because he was the principal draftsman of the Federal Tax Lien Act of 1966. See Hearings on H. R. 11256 and H. R. 11290, p. 60, Legislative History of the Federal Tax Lien Act of 1966, p. 104 (Committee Print compiled for House Committee on Ways and Means, 1966) (hereinafter Legislative History) (statement of Laurens Williams). The commentators also consistently have observed that state homestead laws that merely exempt homestead property from the reach of creditors, rather than vesting indestructible rights in each spouse, are ineffective against federal tax liens. *E. g.*, Plumb, 77 Yale L. J., at 634. See *United States* v. *Heasley*, 283 F. 2d 422, 427 (CA8 1960).

[7] *United States* v. *Hershberger*, 475 F. 2d 677, 682 (CA10 1973); *Jones* v. *Kemp*, 144 F. 2d 478, 480 (CA10 1944); *Morgan* v. *Moynahan*, 86 F. Supp. 522, 525 (SD Tex. 1949); *Bigley* v. *Jones*, 64 F. Supp. 389, 391 (WD Okla. 1946); *Paddock* v. *Siemoneit*, 147 Tex. 571, 585, 218 S. W. 2d 428, 436 (1949).

[8] The Government, in its brief, relies on the American Bar Association's recommendation to Congress, contained in the Report of the ABA Committee on Federal Liens, that federal tax liens not be made subject to the exemption laws of the States. Brief for United States 30, quoting Final Report of the Committee on Federal Liens (1959), reprinted in Legislative History 75, 175–176. As the Government says, "[t]he committee . . . rejected the basic notion as inappropriate, and Congress thereafter refrained from implementing it." Brief for United States 30.

In light of its reliance on this aspect of the ABA Report, it is strange that the Government did not call to the Court's attention a passage appearing on the very next page of the ABA Report, under the heading "*Homesteads*":

"The homestead exemption laws of the States do not apply as against the federal tax lien. But the homestead laws of some States have been held to create an indivisible and vested interest in the husband and wife, which dressed the law of federal tax liens, directing some attention to § 7403.[9] Against the background of this consensus among courts and commentators that tax liens may not be enforced against such homesteads so long as an unindebted spouse still lives, Congress did not change the law.

In fact, in 1954 the Senate foiled an attempt by the House to extend the reach of federal tax liens to tenancies by the entirety, a spousal property interest similar to the Texas homestead.[10] The rule pronounced in the courts, *e. g.*, *United States* v. *Hutcherson*, 188 F. 2d 326, 331 (CA8 1951); *United States* v. *Nathanson*, 60 F. Supp. 193, 194 (ED Mich. 1945), and the view of the commentators, *e. g.*, Anderson, *supra* n. 3, at 254; Clark, *supra* n. 3, at 17, was that tenancies by the entirety, like Texas homesteads, could not be sold to enforce the tax liability of one spouse. The House passed

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cannot be subjected to levy and sale for the separate tax of one of them." Legislative History 177 (citations omitted).

The Report cites the leading cases, *Jones* v. *Kemp*, *supra*, and *Paddock* v. *Siemoneit*, *supra*, which held that the Oklahoma and Texas homestead rights block levy on or forced judicial sale of the homestead for the separate tax liability of one spouse. The ABA Report did not advocate changing what it presented as settled law. Instead, it suggested that a court could "declare, but not foreclose, the lien (so that litigable questions may be disposed of within the period of limitations)." Legislative History 177. The Report went on to suggest that a court could "make such order as may be necessary to protect the Government's interest during the joint lives" of the spouses. *Ibid.* In the Government's words, Congress thereafter refrained from implementing any change in the status of Texas homesteads.

[9] See Federal Tax Lien Act of 1966, Pub. L. 89-719, § 107(b), 80 Stat. 1140; Tax Reform Act of 1976, Pub. L. 94-455, §§ 1906(b)(13)(A) and 2004(f)(2), 90 Stat. 1834 and 1872; Economic Recovery Tax Act of 1981, Pub. L. 97-34, § 422(e)(8), 95 Stat. 316.

[10] The effect of tenancies by the entirety is to create an immunity from the tax collector far broader than that created by Texas homestead provisions. In addition to homestead property, "[b]usiness assets, personal property, and even money may be so held in some states." Plumb, 13 Tax L. Rev., at 262.

an amendment that would have extended the tax lien creat
by § 6321 expressly to the taxpayer's interest as tenant
the entirety. H. R. 8300, 83d Cong., 2d Sess., § 6321 (195
(Code bill). The Senate removed the language, stating: "T
deletion of the phrase is intended to continue the existi
law." S. Rep. No. 1622, 83d Cong., 2d Sess., 575 (195

It is true, of course, that tenancies by the entirety we
held to be immune from federal tax sales on a theory differe
from that applied to homestead property like Mrs. Rodger
See *ante*, at 703–704, n. 31. But it was established that bo
types of property interests precluded the Government fr
satisfying the tax debts of one spouse by selling the joint
owned property. In the absence of any evidence of congre
sional intent to the contrary, this deliberate choice to lea
undisturbed the bar to tax enforcement created by a tenan
by the entirety [11] suggests that Congress did not object to t
similar effect of the Texas homestead right, an effect consis
ent with principles basic to the common law of liens.

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[11] The Court implies that the Senate's stated intention "to continue t
existing law" may have indicated a view that existing law permitted sa
of a tenancy by the entirety to satisfy a single spouse's tax debts. *Ante*,
703–704, n. 31. This argument is difficult to understand, given the Cour
apparent agreement that judicial interpretation of the tax lien provisi
was unequivocally to the contrary. *Ante*, at 703, n. 31. Moreover, t
Senate Report's suggestion that the amendment might not significan
have changed the law, see *ante*, at 704, n. 31, does not advance the Cour
case. The amendment would have allowed the federal tax lien merely
attach to the interests in property of the delinquent spouse. Like Tex
homestead property, however, a tenancy by the entirety usually vests t
entire estate in both spouses, bars either spouse from disposing of it wi
out the concurrence of the other, and prevents either spouse from destr
ing the other's survivorship rights. *United States* v. *Hutcherson*, 1
F. 2d 326, 329 (CA8 1951). Thus, even if the lien attached to the del
quent spouse's interest in the property by virtue of the amendment, t
traditional rule that the lienholder gains only those property rights p
sessed by the debtor would have precluded a sale. See generally Plum
77 Yale L. J., at 637–638.

B

Although disclaiming it as a basis for decision, the Court relies on *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326, 339–341 (1890), to support its reading of § 7403. *Ante*, at 691–692, n. 17. In *Mansfield*, a tenant who operated a distillery on leased property fell delinquent in its taxes. The Government sought to sell by administrative levy the entire fee, not just the tenant's leasehold interest. The fee was owned by a third party, and the delinquent taxpayer's leasehold interest obviously did not give him the power to sell the fee. The *Mansfield* Court would not allow a sale by administrative levy, but suggested that on the facts of that case, the Government could seek a judicial sale of the entire property under the predecessor of § 7403. Focusing on just this portion of the *Mansfield* opinion, the Court now states that "[r]ead broadly, *Mansfield* is on 'all fours' with our holding today." *Ante*, at 692, n. 17.

To the contrary, *Mansfield* is not on "all fours" with today's holding, and indeed undermines it. In the same 1868 Act in which it passed the original predecessor to § 7403, Congress enacted a separate provision to ensure the collection of taxes from distillers. Section 8 of that Act required each distiller to own its distillery property in fee and free from liens. Alternatively, a distiller could file with the tax collector the fee owner's written consent granting a tax lien of the United States priority over all other claims to the property, and granting the United States full title in the property in case of forfeiture. Act of July 20, 1868, ch. 186, § 8, 15 Stat. 128.

The taxpayer's landlord in *Mansfield* had executed such a waiver, and the Court stated that "the vital question" was the waiver's effect. 135 U. S., at 338. Rejecting the Government's position, the Court held that the waiver did not permit sale of the property by administrative levy. The Court made clear, however, that its reading of the statute did not render the waiver requirement useless. "By the waiver the government . . . acquired the right, by a suit [under the predecessor of § 7403], to have sold, under the decree of a court, not only the distiller's leasehold interest, but the fee in the premises." *Id.*, at 340.

Thus, the *Mansfield* Court considered the waiver to be a condition precedent to the Government's power, under the predecessor of § 7403, to sell the landlord's fee interest when the tenant was in default in its taxes. If § 7403 gives the Government this power without the necessity of a waiver—as the Court today holds—it seems unlikely that Congress would have considered it necessary, in the very Act in which it passed § 7403's predecessor, to require that a distiller either own the fee outright or obtain from its landlord advance authorization for a sale of the fee to satisfy the distiller's tax liabilities.[12] Outside the distillery context, Congress must have intended that the Government's power to force a sale of the fee would be no more extensive than that of the delinquent taxpayer.

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[12] It is the Court that quotes out of context from *Mansfield*. The waiver provision of the 1868 Act ensured that all distillery property either would be owned in fee by the distiller or would be owned by a third party subject to a waiver of ownership rights in favor of the Government in the event of a default. The "general statement" on which the Court relies, see *ante*, at 692, n. 17, refers specifically to the application of § 7403's predecessor to the sale of distillery property: "In order to collect the taxes due from . . . the *distiller*, [the Government] might have instituted a suit in equity, to which not only the *distiller*, . . . but all persons . . . claiming any interest in, the premises could be made parties . . . ." 135 U. S., at 339 (emphasis supplied). Even viewed in isolation, this statement need not be read as applying outside the distillery context. On the next page of its opinion, the *Mansfield* Court resolved whatever doubt might have remained about the breadth of this passage. It stated that the waiver, *in addition* to giving the Government priority over the owner of the property, gave the Government the right, by a suit in equity, to sell the fee in the premises. *Id.*, at 340.

C

The Court's "broad reading" of *Mansfield*'s holding reflects only the extraordinary breadth of its own. As read by the Court, *Mansfield* authorizes, without the consent of the owner of the fee, a judicial sale of a building should a tenant fail to pay his taxes, a judicial sale of a farm should the holder of an easement across it become delinquent,[13] or a judicial sale of a condominium or cooperative apartment house to satisfy the tax debt of any co-owner.[14] The Court imputes to Congress an intent to permit the sale of the farm or the building even though the fee owners have paid their taxes and even though, in signing a lease or conveying an easement, the fee owners did not surrender their indefeasible right to prevent the sale of their property.

Prior to 1936, moreover, the predecessor of § 7403(c) *required* a court at the Government's request to sell the property in which the tax debtor had an interest. See *ante*, at 706–709. Thus, the Court's view attributes to Congress the incredible intention to *mandate* the sale of the entire property whenever the holder of an easement, a tenant, or one with a similarly minimal interest fails to pay a tax and the Government invokes its right to bring an action to enforce its lien. It is hardly surprising that counsel for the Government has been unable to cite a single instance before or after this Court's decision in *Mansfield* in which the Government, outside the context of the homestead cases, invoked § 7403 or its predecessors to assert a property right greater than the taxpayer himself could have asserted. Tr. of Oral Arg. 14–16. To abrogate the common-law rule that the tax collector gains only the property rights of the tax debtor leads to absurd results.

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[13] At oral argument, the Government admitted that its interpretation of §§ 6321 and 7403 would entitle it to seek the sale of residential property across which a neighbor, delinquent in his taxes, held an easement. Tr. of Oral Arg. 9–10. The Government indicated that it would exercise its discretion to sell just the easement "where there is a separate market" for it. *Id.*, at 9.

[14] Even the Internal Revenue Service does not take its approach to the statute this far. The Service has ruled that when a delinquent taxpayer owns a time-sharing condominium interest, "[t]he federal tax lien may be enforced against the delinquent taxpayer's interest but not against the condominium unit itself." Rev. Rul. 79–55, 1979–1 Cum. Bull. 400, 401. The Service apparently reads its own limitation into the statute's plain language: sale of property in which a delinquent taxpayer owns a partial interest is permitted only where "the property is not capable of being divided among the co-owners." *Ibid.*

Presumably, the Court would agree that it would be an abuse of discretion for a court to order a sale of an entire property capable of division among co-owners. See *ante*, at 709–711. If the Court is willing to read this limit into the statute, however, I fail to see how the Court can refuse to recognize a limit in the basic common-law proposition that the lienholder obtains no rights that the debtor did not have. See *United States* v. *Hershberger*, 475 F. 2d, at 679, 682.

III

Without direct evidence of congressional intent to contravene the traditional—and sensible—common-law rule, the Court advances three arguments purporting to lend indirect support for its construction of § 7403.

A

First, the Court claims that its construction is consistent with the policy favoring "the prompt and certain collection of delinquent taxes." *Ante*, at 694. This rationale would support any exercise of governmental power to secure tax payments. Were there two equally plausible suppositions of congressional intent, this policy might counsel in favor of choosing the construction more favorable to the Government. But when one interpretation contravenes both traditional rules of law and the common sense and common values on which they are built, the fact that it favors the Government's interests cannot be dispositive.[15]

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[15] Similarly important but general policies, coupled with broad statutory language, were insufficient to overcome the common-law rules in both *Sanges* and the § 1983 cases. See n. 5, *supra*.

Moreover, the Government's interest would not be compromised substantially by a rule permitting it to sell property only when the delinquent taxpayer could have done so. In this case, the delinquent taxpayer's homestead interest, it is assumed, gave him a "half-interest in the underlying ownership rights to the property being sold." *Ante*, at 699. An immediate forced sale of the entire property would yield for the Government no more than half the present value of the remainder interest, the residue left after the present values of the nondelinquent spouse's life estate and half-interest in the remainder are subtracted. As the Court notes, the Government can expect to receive only a small fraction of the proceeds. *Ibid.* An immediate sale of the delinquent taxpayer's future interest in the property might well command a commensurate price.

Alternatively, the Government could maintain its lien on the property until Mrs. Rodgers dies and then could force a sale. Because the delinquent taxpayer's estate retains a half-interest in the remainder, the Government would be entitled to half of the proceeds at that time. The Government's yield from this future sale, discounted to its present value, should not differ significantly from its yield under the Court's approach. The principal difference is that, following the common-law rule, Mrs. Rodgers' entitlement to live out her life on her homestead would be respected.

An approach consistent with the common law need not prejudice the Government's interest in the "certain" collection of taxes. Under § 7403(d),[16] the District Court has the power to appoint a receiver, who could supervise the property to protect the Government's interests while respecting Mrs. Rodgers' rights to possession and enjoyment. Plumb,

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[16] Section 7403(d) provides:

"In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

77 Yale L. J., at 638. Indeed, just such an approach was suggested by the American Bar Association's Committee on Federal Liens, 84 A. B. A. Rep. 645, 681–682 (1959), which drafted the tax lien amendments adopted in 1966. Legislative History 108–109 (statement of Laurens Williams).

B

The Court also would support its construction by contrasting § 7403 with the more restrictive language of § 6331, the administrative tax levy provision. *Ante*, at 695–697. It is true that § 6331 permits the sale only of "property and rights to property . . . belonging to" the taxpayer, while § 7403 generally authorizes the sale of property in which the taxpayer has an interest. But the greater power conferred by § 7403 is needed to enable the Government to seek the sale of jointly owned property whenever the tax debtor's rights in the property would have permitted *him* to seek a forced sale. Section 7403 certainly permits the Government, in such circumstances, to seek partition of the property in federal, rather than state, court, to seek authority to sell the tax debtor's part or the whole, and, in the same proceeding, to have determined the entitlements of the various claimants, including competing lienholders, to the proceeds of the property sold. See generally Plumb, 77 Yale L. J., at 628–629. Absent the more expansive language of § 7403, this would not be possible. That language, however, does not manifest congressional intent to produce the extraordinary consequences yielded by the Court's interpretation.

C

The Court also asserts that its construction of § 7403 is consistent with "the traditional powers of a taxing authority in an *in rem* enforcement proceeding," even if it is not consistent with the traditional rights of lienholders. *Ante*, at 694–695 and 702. This, with all respect, is not so. *In rem* tax enforcement proceedings never have been used to sell property belonging to unindebted third parties in order to satisfy a tax delinquency unrelated to the property sold. As the Court recognizes, *ante*, at 694, such proceedings are brought to sell land in order to satisfy delinquent ad valorem taxes assessed on the land itself. 2 T. Cooley, Law of Taxation 866, 910 (3d ed. 1903). It is said that the land itself is liable for such taxes, and that conflicting ownership rights thus do not bar its sale. See *id.*, at 866–868; H. Black, Law of Tax Titles 296 (1888); W. Burroughs, Law of Taxation 346–349 (1877). The cases relied upon by the Court for the proposition that *in rem* tax proceedings extinguish the homestead rights of an unindebted spouse merely applied this rule. *Lucas* v. *Purdy*, 142 Iowa 359, 120 N. W. 1063 (1909); *Robbins* v. *Barron*, 32 Mich. 36 (1875); *Jones* v. *Devore*, 8 Ohio St. 430 (1858).

On the other hand, if the tax is assessed on an individual's separate interest in the land, rather than on the land itself, the tax debt is personal to the individual and "[n]othing more [than the individual's interest] . . . can become delinquent; nothing more can be sold." Black, *supra*, at 301; see R. Blackwell, On the Power to Sell Land 908, 920, 942 (5th ed. 1889); 2 Cooley, *supra*, at 870–871; Burroughs, *supra*, at 347. The real property interests of third parties cannot be sold through an *in rem* proceeding to satisfy a personal tax liability. The "traditional powers of a taxing authority" to sell the entire property and extinguish the interests of unindebted third parties thus are limited to collection of taxes assessed on the land itself, and have no application to delinquent taxes, like those at issue in these cases, assessed personally against one joint owner.[17]

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[17] Congress was fully aware of this distinction in 1868. In 1863, Congress amended a tax statute, explicitly imposing a tax directly on land, and vesting title upon default "in the United States or in the purchasers at [a tax] sale, in fee simple," free and discharged from "all . . . claim[s] whatsoever." See *Turner* v. *Smith*, 14 Wall. 553, 554–555 (1872) (emphasis deleted). The Court distinguished between this tax, "clearly a direct tax on the land, and on all the estates, interests, and claims connected with or

Some States, it is true, have authorized by statute the sale of real property to satisfy the owner's tax debts, even where the delinquent taxes are unrelated to the property. See *Larimer County* v. *National State Bank of Boulder*, 11 Colo. 564 (1888); *Iowa Land Co.* v. *Douglas County*, 8 S. D. 491 (1896). The Court does not suggest, however, that jointly owned real property ever has been sold pursuant to such a statute when an unindebted co-owner has indefeasible rights therein. Indeed, the traditional distinction between taxes for which the land is liable and tax liabilities personal to the taxpayer would preclude such a sale. Thus, even if one purpose of § 7403's predecessor statute "was to obtain for the federal tax collector some of the advantages that many States enjoyed through *in rem* tax enforcement," *ante*, at 695, Congress would not have intended the result the Court reaches today. A state tax collector could not confiscate the indefeasible real property interests of a nondelinquent third party to satisfy the personal tax liability of a co-owner.[18]

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growing out of the land," *id.*, at 563, and the tax authorized by the prior statute, which arguably was imposed merely "on the owner of the land, and levied on the interest of the owner in it." *Id.*, at 562. The Court held that these amendments made clear that Congress intended to permit the sale of all interests in the property upon default.

Congress did not include similar language in the predecessor statute to § 7403, enacted only five years later, presumably because it was aware that it authorized the sale of land to satisfy personal tax liabilities, rather than to collect direct taxes on the land. As the *Mansfield* case makes clear, *supra*, at 721–722, Congress knew how to gain the benefits of *in rem* proceedings in this context if it so desired: it could obtain a waiver from the owner of the fee, acquiring the right to sell the property regardless of ownership, and permitting a fee simple to vest in the United States, or in a purchaser at a tax sale, upon default.

[18] The Court also relies on certain cases "outside the context of *in rem* proceedings" upholding state statutes specifically authorizing enforcement of property taxation through the sale of all personalty in the delinquent taxpayer's possession, whether or not the taxpayer owns it. *Ante*, at 695, n. 19. The courts in these cases expressed considerable discomfort with such statutes, but deferred to the legislatures' explicit intention that owner-

IV

The Court recognizes that Mrs. Rodgers has an indestructible property right under Texas law to use, possess, and enjoy her homestead during her lifetime, and that the delinquent taxpayer's property interests would not have enabled him to disturb that right against her will. *Ante*, at 685–686. The Court recognizes that Mrs. Rodgers has no outstanding tax liability and that the Government has no lien on Mrs. Rodgers' property or property rights. Because I conclude that Congress did not intend § 7403 to permit federal courts to grant property rights to the Government greater than those enjoyed by the tax debtor, I would hold that the Government may not sell Mrs. Rodgers' homestead without her consent. To the extent the Court holds to the contrary, I respectfully dissent.

V

Mrs. Ingram's case, however, is materially different. Like her husband, Mrs. Ingram was liable for back taxes, and consequently the Government had a lien on her interests in property as well as on her husband's interests. Exercising both spouses' rights in the homestead, the Government is en-

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ship was to be presumed from possession. See *Sears* v. *Cottrell*, 5 Mich. 251, 254–255 (1858); *id.*, at 257 (concurring opinion). Section 7403, in contrast, is not explicit on the issue before the Court. Moreover, these state statutes hardly could have provided a model for Congress; they did not affect real property, which was the sole subject of the predecessor statute to § 7403. See n. 4, *supra*. They simply created an irrebuttable presumption that one in possession of personal property was its owner, in order to avoid the fraud and collusion that inevitably would result from a contrary rule. See *Hersee* v. *Porter*, 100 N. Y. 403, 409–410, 3 N. E. 338, 339–340 (1885); *Sears* v. *Cottrell*, 5 Mich., at 266 (concurring opinion). Real property, which is immovable and subject to stringent recording requirements, does not pose these dangers and thus does not require similar measures.

International Harvester Credit Corp. v. *Goodrich*, 350 U. S. 537 (1956), relied upon *ante*, at 695, n. 19, is not relevant. There, the Court merely ratified a State's choice to give its tax lien priority over competing liens.

titled to force a sale, Plumb, 13 Tax L. Rev., at 263; see *Shambaugh* v. *Scofield*, 132 F. 2d 345 (CA5 1942), subject only to the discretion of the District Court. See *ante*, at 703–711. Second, when Mrs. Ingram and her former husband were divorced, the homestead became subject to partition under Texas law. See *ante*, at 685, n. 10. In Mrs. Ingram's case, therefore, I concur in the result.

BILL JOHNSON'S RESTAURANTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81–2257. Argued March 29, 1983—Decided May 31, 1983

After one Helton, a waitress at petitioner's restaurant, filed unfair labor practice charges with the National Labor Relations Board (NLRB) alleging that she had been fired because of her efforts to organize a union, Helton and others, including other waitresses, picketed the restaurant and distributed leaflets. Petitioner and three of its co-owners then filed a suit for damages and injunctive relief against Helton and the other demonstrators in an Arizona state court, alleging that the defendants had harassed customers, blocked access to the restaurant, created a threat to public safety, and libeled plaintiffs by false statements in the leaflets. On the following day, Helton filed a second charge with the NLRB, alleging, *inter alia*, that petitioner had filed the civil suit in retaliation for the defendants' protected, concerted activities and the filing of charges against petitioner with the NLRB. After a consolidated hearing on the unfair labor practice complaints, an Administrative Law Judge (ALJ) concluded that, "on the basis of the record and from [his] observation of the witnesses," the evidence failed to support the allegations of the complaint in the state-court action, and that such action thus lacked a "reasonable basis" and its prosecution was retaliatory, in violation of §§ 8(a)(1) and (4) of the National Labor Relations Act (Act). On petitioner's appeal, the NLRB adopted, with minor exceptions, the ALJ's findings and recommendations, and ordered petitioner to withdraw its state-court complaint. The Court of Appeals enforced the NLRB's order.

Held:

1. The NLRB may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit. Pp. 740–744.

(a) The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act. The Act's provisions guaranteeing employees the enjoyment of their rights to unionize, engage in concerted activity, and utilize the NLRB's processes without fear of coercion or retaliation by their employer are to be liberally construed. However, countervailing considerations against allowing the NLRB to condemn the filing of a suit as an unfair labor practice include the First Amendment right of access to the courts and the States' compelling interests in maintaining domestic peace and protecting its citizens' health and welfare. Thus, the NLRB's interpretation of the Act that the *only* essential element of a violation by the employer is retaliatory motive in filing a state-court suit is untenable. Pp. 740–743.

(b) However, it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by the Act. Such suits are not within the scope of First Amendment protection, and the state interests noted above do not enter into play when the suit has no reasonable basis. Pp. 743–744.

2. In determining whether a state-court suit lacks a reasonable basis, the NLRB is not limited to considering the bare pleadings in the suit, but its inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state-court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit. Therefore, if the NLRB is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that such genuine material factual or legal issues exist, the NLRB must await the results of the state-court adjudication with respect to the merits of the state suit. If the state proceedings result in a judgment adverse to the plaintiff, the NLRB may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the NLRB may find a violation and order appropriate relief. Pp. 744–747.

3. This case must be returned to the NLRB for further consideration in light of the proper standards. It was not the ALJ's province, based on his own evaluation of the evidence, to determine that the libel and business-interference counts in petitioner's state-court suit were in fact without merit. He should have limited his inquiry to the question whether petitioner's evidence raised factual issues that were genuine and material. Furthermore, because, in enforcing the NLRB's order, the Court of Appeals ultimately relied on the fact that "substantial evidence" supported the NLRB's finding that the prosecution of the lawsuit violated the Act, the NLRB's error has not been cured. Pp. 747–748.

660 F. 2d 1335, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, *post*, p. 750.

Lawrence Allen Katz argued the cause and filed briefs for petitioner.

Carolyn F. Corwin argued the cause for respondent. With her on the brief were *Solicitor General Lee, Deputy Solicitor General Wallace, Norton J. Come, Linda Sher,* and *Candace M. Carroll.**

JUSTICE WHITE delivered the opinion of the Court.

We must decide whether the National Labor Relations Board may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law.

I

The present controversy arises out of a labor dispute at "Bill Johnson's Big Apple East," one of four restaurants owned and operated by the petitioner in Phoenix, Ariz. It began on August 8, 1978, when petitioner fired Myrland Helton, one of the most senior waitresses at the restaurant. Believing that her termination was the result of her efforts to organize a union, she filed unfair labor practice charges against the restaurant with the Board.

On September 20, after an investigation, the Board's General Counsel issued a complaint. On the same day, Helton, joined by three co-waitresses and a few others, picketed the restaurant. The picketers carried signs asking customers to boycott the restaurant because its management was unfair to the waitresses. Petitioner's manager confronted the picketers and threatened to "get even" with them "if it's the last thing I do." Petitioner's president telephoned the husband

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**J. Albert Woll, Laurence Gold, Michael H. Gottesman,* and *Jeremiah A. Collins* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Edward B. Miller, Matthew R. McArthur, and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

of one of the picketing waitresses and impliedly threatened that the couple would "get hurt" and lose their new home if the wife continued to participate in the protest. The picketing continued on September 21 and 22. In addition, the picketers distributed a leaflet that accused management of making "[u]nwarranted sexual advances" and maintaining a "filthy restroom for women employees." The leaflet also stated that a complaint against the restaurant had been filed by the Board and that Helton had been fired after suggesting that a union be organized.

On the morning of September 25, petitioner and three of its co-owners filed a verified complaint against Helton and the other demonstrators in an Arizona state court. Plaintiffs alleged that the defendants had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant, and created a threat to public safety. The complaint also contained a libel count, alleging that the leaflet contained false and outrageous statements published by the defendants with the malicious intent to injure the plaintiffs. The complaint sought a temporary restraining order and preliminary and permanent injunctive relief, as well as compensatory damages, $500,000 in punitive damages, and appropriate further legal and equitable relief. App. 3–9. After a hearing, the state court declined to enjoin the distribution of leaflets but otherwise issued the requested restraining order. *Id.*, at 19–23. Expedited depositions were also permitted. The defendants retained counsel and, after a hearing on the plaintiffs' motion for a preliminary injunction on November 16, the court dissolved the temporary restraining order and denied preliminary injunctive relief. *Id.*, at 52.

Meanwhile, on the day after the state-court suit was filed, Helton filed a second charge with the Board alleging that petitioner had committed a number of new unfair labor practices in connection with the dispute between the waitresses and the restaurant. Among these was a charge that petitioner had filed the civil suit in retaliation for the defendants' protected, concerted activities, and because they had filed charges under the Act. The General Counsel issued a complaint based on these new charges on October 23. As relevant here, the complaint alleged that petitioner, by filing and prosecuting the state suit, was attempting to retaliate against Helton and the others, in violation of §§ 8(a)(1) and (4) of the National Labor Relations Act (NLRA or Act), 29 U. S. C. §§ 158(a)(1) and (4).[1]

In December 1978, an Administrative Law Judge (ALJ) held a 4-day consolidated hearing on the two unfair labor practice complaints.[2] On September 27, 1979, the ALJ rendered a decision concluding that petitioner had committed a total of seven unfair labor practices during the course of the labor dispute. 249 N. L. R. B. 155, 168–169 (1980). With regard to the matter presently before us, the ALJ agreed with the General Counsel that the prosecution of the civil suit violated §§ 8(a)(1) and (4). The ALJ applied the rationale of *Power Systems, Inc.*, 239 N. L. R. B. 445, 449–450 (1978), enf. denied, 601 F. 2d 936 (CA7 1979), in which the Board held that it is an unfair labor practice for an employer to institute a civil lawsuit for the purpose of penalizing or discouraging its employees from filing charges with the Board or seeking access to the Board's processes.

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[1] These provisions state:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section [7 of the Act];

. . . . .

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 61 Stat. 140, 141, 29 U. S. C. §§ 158(a)(1) and (4).

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 61 Stat. 140, 29 U. S. C. § 157.

[2] On March 15, 1979, while the ALJ had the matter under submission, the state court issued an order granting the defendants' motion for summary judgment on the business interference claims but leaving the libel count for trial. Before the state court issued this ruling, the defendants had filed a counterclaim alleging abuse of process, malicious prosecution, wrongful injunction, libel, and slander. The parties then apparently cross-moved for summary judgment on both the claim and the counterclaim. The state court, in the same order of March 15, 1979, dismissed the abuse of process count in the counterclaim and left the libel counterclaim for trial. See App. to Brief for Petitioner D1.

Meanwhile, there had been other developments. On October 27, 1978, the Board's Regional Director petitioned the United States District Court pursuant to § 10(j) of the Act, 29 U. S. C. § 160(j), for an order enjoining petitioner from maintaining its state-court suit pending a final Board decision. On January 22, 1979, the District Court denied the request for an injunction. App. to Brief for Petitioner C1–C7.

In *Power Systems*, the Board inferred that the employer had acted with retaliatory animus from the fact that the employer lacked "a reasonable basis upon which to assert" that its suit had merit. Similarly, in the present case, the ALJ found that petitioner's suit lacked a reasonable basis and then concluded from this fact that the suit violated the Act because it was "an attempt to penalize Helton for having filed charges with the Board, and to penalize the other defendants for assisting Helton in her protest of the unfair labor practice committed against her." 249 N. L. R. B., at 165. He bolstered his conclusion by noting the direct evidence that the suit had been filed for a retaliatory purpose, *i. e.*, the threats to "get even with" and "hurt" the defendants. *Ibid.*

The ALJ reached his conclusion that petitioner's state suit lacked a reasonable basis "on the basis of the record and from [his] observation of the witnesses, including their demeanor, and upon the extensive briefs of the parties." *Id.*, at 164. In the view of the ALJ, the "evidence fail[ed] to support" the complaint's allegations that the picketers clogged the sidewalks, harassed customers, or blocked entrances and exits to the restaurant. *Id.*, at 165. The libel count was deemed baseless because "the evidence establishe[d] the truthfulness" of everything stated in the leaflet.[3]

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[3] The ALJ was apparently not made aware of the state court's denial of summary judgment as to the libel count. This fact is most apparent by virtue of the ALJ's statement, 249 N. L. R. B., at 163, that the defendants' counterclaim for abuse of process [illegible] still pending before the state

On petitioner's appeal, the Board adopted, with minor exceptions, the ALJ's findings, conclusions of law, and recommended order. *Id.*, at 155. Accordingly, petitioner was ordered to undertake a number of remedial measures. Among other things, petitioner was required to withdraw its state-court complaint and to reimburse the defendants for all their legal expenses in connection with the suit. *Id.*, at 169–170.

The Court of Appeals enforced the Board's order in its entirety, 660 F. 2d 1335 (CA9 1981), holding that substantial evidence supported both the Board's findings that the employer's "lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton [and] the picketers for engaging in protected activity." *Id.*, at 1342. Petitioner sought certiorari, urging that it could not properly be enjoined from maintaining its state-court action.[4] We granted the writ, 459 U. S. 942 (1982), and we now vacate and remand for further proceedings.

II

The question whether the Board may issue a cease-and-desist order to halt an allegedly retaliatory lawsuit filed by an employer in a state court has had a checkered history before the Board.[5] At first, in *W. T. Carter & Bro.*, 90 N. L. R. B.

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court. As noted in n. 2, *supra*, the state court dismissed the abuse of process counterclaim at the same time it denied summary judgment on the libel counts of both the claim and counterclaim.

[4] In its merits brief, petitioner for the first time argues to this Court that the Board erred by concluding that the taking of the state-court defendants' depositions constituted an unfair labor practice. Brief for Petitioner 33–36. This issue was not presented in the petition for certiorari and we decline to consider it. See this Court's Rule 34.1(a).

[5] It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. Brief for Petitioner 12–13, 20; Reply Brief for Petitioner 8. Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could

2020, 2023–2024 (1950), where an employer sued and obtained a state-court injunction barring its employees from holding union meetings on company property, a divided Board held that the prosecution of the suit constituted an unfair labor practice. The Board analogized from the common law of malicious prosecution and rejected the employer's contention that its "resort to court proceedings was a lawful exercise of a basic right." The dissent objected that the Board should recognize the employer's right to present its case to a judicial forum, *even if* its motive in doing so was to interfere with its employees' rights. *Id.*, at 2029 (Herzog, Chairman, dissenting). Ten years later, in *Clyde Taylor Co.*, 127 N. L. R. B. 103, 109 (1960), where the employer obtained an injunction banning peaceful union picketing in protest of unlawful discharges, the Board overruled *W. T. Carter* and adopted the view of the earlier dissent.

During the next 18 years after *Clyde Taylor*, the Board's decisions do not appear to us to have been entirely consist-

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not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N. L. R. B. 636, 637 (1970), enf. denied, 446 F. 2d 369 (CA1 1971), rev'd, 409 U. S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N. L. R. B. 380, 383 (1970), enf'd in relevant part, 148 U. S. App. D. C. 119, 459 F. 2d 1143 (1972), aff'd, 412 U. S. 84 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971).

Nash-Finch also requires rejection of petitioner's assertion that the Board is precluded from enjoining a state-court suit by virtue of 28 U. S. C. § 2283, which, subject to certain exceptions, prohibits a court of the United States from enjoining proceedings in a state court. In *Nash-Finch*, the Court held that § 2283 was inapplicable in instances where the Board files an action to restrain unfair labor practices, because the purpose of § 2283 "was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." 404 U. S., at 146.

ent.[6] Then, in *Power Systems*, 239 N. L. R. B., at 450, the Board concluded: "Since we have found that Respondent had no reasonable basis for its lawsuit, . . . the lawsuit had as its purpose the unlawful objective of penalizing [the employee] for filing a charge with the Board." The suit therefore was enjoined as an unfair labor practice. The gravamen of the offense was thus held to be the unlawful objective, which could be inferred by lack of a reasonable basis for the employer's suit.

Although the Board in *Power Systems* purported to distinguish *Clyde Taylor* and its progeny on the basis that the lawsuit in each of those cases "was not a tactic calculated to restrain employees in the exercise of their rights under the Act," 239 N. L. R. B., at 449, the distinction was illusory. In *Clyde Taylor* itself the Board found no unfair labor practice despite the ALJ's specific finding that the employer's lawsuit "was for the purpose of preventing his employees from exercising the rights guaranteed to them under the Act, rather than for the purpose of advancing any legitimate interest of his own." 127 N. L. R. B., at 121. Since 1978, the Board has consistently adhered to the *Power Systems* rule that an employer or union who sues an employee for a retaliatory motive is guilty of a violation of the Act.[7] Under this line of cases, as the Board's brief and its counsel's remarks at oral argument in the present case confirm,[8] the Board does not regard lack of merit in the employer's suit as an independent element of the §8(a)(1) and §8(a)(4) unfair labor practice. Rather, it asserts that the *only* essential element of a violation is retaliatory motive.

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[6] Compare, *e. g.*, *S. E. Nichols Marcy Corp.*, 229 N. L. R. B. 75 (1977); *Peddie Buildings*, 203 N. L. R. B. 265 (1973); and *United Aircraft Corp. (Pratt & Whitney Division)*, 192 N. L. R. B. 382 (1971), modified, 534 F. 2d 422 (CA2 1975), cert. denied, 429 U. S. 825 (1976); with, *e. g.*, *United Stanford Employees, Local 680*, 232 N. L. R. B. 326 (1977); *International Organization of Masters, Mates and Pilots*, 224 N. L. R. B. 1626 (1976), enf'd, 188 U. S. App. D. C. 15, 575 F. 2d 896 (1978); and *Television Wisconsin, Inc.*, 224 N. L. R. B. 722 (1976).

[7] See *Sheet Metal Workers' Union Local 355*, 254 N. L. R. B. 773, 778–780 (1981); *United Credit Bureau of America, Inc.*, 242 N. L. R. B. 921, 925–926 (1979), enf'd, 643 F. 2d 1017 (CA4), cert. denied, 454 U. S. 994 (1981); *George A. Angle*, 242 N. L. R. B. 744 (1979), enf'd, 683 F. 2d 1296 (CA10 1982).

III

A

At first blush, the Board's position seems to have substance. Sections 8(a)(1) and (4) of the Act are broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by §7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer. The Court has liberally construed these laws as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities.[9] A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. As the Board has observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. *Power Systems*, *supra*, at 449. Furthermore, as the Court of Appeals in the present case noted, the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. 660 F. 2d, at 1343, n. 3. Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

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[8] See Brief for Respondent 13, 18–21. At oral argument, despite close questioning by the Court, the Board's counsel declined to rule out the possibility that prosecution of a totally meritorious suit might be deemed by the Board to be an unfair labor practice, if filed for a retaliatory purpose. Tr. of Oral Arg. 29–35, 39–41, 46–47.

[9] See, *e. g., NLRB* v. *Scrivener*, 405 U. S. 117, 121–125 (1972); *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 617–619 (1969); *NLRB* v. *Exchange Parts Co.*, 375 U. S. 405, 408–410 (1964); *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 797–798 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 182–187 (1941).

There are weighty countervailing considerations, however, that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. *Id.*, at 511. We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized: "[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Peddie Buildings*, 203 N. L. R. B. 265, 272 (1973), enf. denied on other grounds, 498 F. 2d 43 (CA3 1974). See also *Clyde Taylor Co.*, 127 N. L. R. B., at 109.

Moreover, in recognition of the States' compelling interest in the maintenance of domestic peace, the Court has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests "deeply rooted in local feeling and responsibility." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959). It has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute. See, *e. g.*, *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978); *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966); *Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954).

In *Linn* v. *Plant Guard Workers*, *supra*, at 65, we held that an employer can properly recover damages in a tort action arising out of a labor dispute if it can prove malice and actual injury. See also *Farmer* v. *Carpenters*, *supra*, at 306. If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury, since the "Board can award no damages, impose no penalty, or give any other relief" to the plaintiff. *Linn*, *supra*, at 63. Thus, to the extent the Board asserts the right to declare the filing of a meritorious suit to be a violation of the Act, it runs headlong into the basic rationale of *Linn*, *Farmer*, and other cases in which we declined to infer a congressional intent to ignore the substantial state interest "in protecting the health and well-being of its citizens." *Farmer*, *supra*, at 302–303. See also *Sears, Roebuck & Co.* v. *Carpenters*, *supra*, at 196; *Linn*, *supra*, at 61.

Of course, in light of the Board's special competence in applying the general provisions of the Act to the complexities of industrial life, its interpretations of the Act are entitled to deference, even where, as here, its position has not been entirely consistent. *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 264–267 (1975); *NLRB* v. *Seven-Up Co.*, 344 U. S. 344, 347–349 (1953). And here, were only the literal language of §§ 8(a)(1) and 8(a)(4) to be considered, we would be inclined to uphold the Board, because its present construction of the statute is not irrational. Considering the First Amendment right of access to the courts and the state interests identified in cases such as *Linn* and *Farmer*, however, we conclude that the Board's interpretation of the Act is untenable. The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.

B

Although it is not unlawful under the Act to prosecute a meritorious action, the same is not true of suits based on insubstantial claims—suits that lack, to use the term coined by the Board, a "reasonable basis." Such suits are not within the scope of First Amendment protection:

> "The first amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition."[10]

Just as false statements are not immunized by the First Amendment right to freedom of speech, see *Herbert* v. *Lando*, 441 U. S. 153, 171 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974), baseless litigation is not immunized by the First Amendment right to petition.

Similarly, the state interests recognized in the *Farmer* line of cases do not enter into play when the state-court suit has no basis. Since, by definition, the plaintiff in a baseless suit has not suffered a legally protected injury, the State's interest "in protecting the health and well-being of its citizens," *Farmer*, *supra*, at 303, is not implicated. States have only a negligible interest, if any, in having insubstantial claims adjudicated by their courts, particularly in the face of the strong federal interest in vindicating the rights protected by the national labor laws.

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[10] Balmer, Sham Litigation and the Antitrust Laws, 29 Buffalo L. Rev. 39, 60 (1980). Accord, *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F. 2d 1252, 1265–1266 (CA9 1982); Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 101 (1977).

Considerations analogous to these led us in the antitrust context to adopt the "mere sham" exception in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972). We should follow a similar course under the NLRA. The right to litigate is an important one, and the Board should consider the evidence with utmost care before ordering the cessation of a state-court lawsuit. In a proper case, however, we believe that Congress intended to allow the Board to provide this remedy. Therefore, we hold that it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA.

IV

Having concluded that the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board, we now inquire into what steps the Board may take in evaluating whether a state-court suit lacks the requisite basis. Petitioner insists that the Board's prejudgment inquiry must not go beyond the four corners of the complaint. Its position is that as long as the complaint seeks lawful relief that the state court has jurisdiction to grant, the Board must allow the state litigation to proceed. The Board, on the other hand, apparently perceives no limitations on the scope of its prejudgment determination as to whether a lawsuit has a reasonable basis. In the present case, for example, the ALJ conducted a virtual trial on the merits of petitioner's state-court claims. Based on this *de facto* trial, the ALJ concluded, in his independent judgment, based in part on "his observation of the witnesses, including their demeanor," that petitioner's suit lacked a reasonable basis.

We cannot agree with either party. Although the Board's reasonable-basis inquiry need not be limited to the bare pleadings, if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined. When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.[11] Hence, we conclude that if a state plaintiff is able to present the

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[11] In civil practice, the "genuine issue" test is used for adjudging motions for summary judgment. See Fed. Rule Civ. Proc. 56. Substantively, it is very close to the "reasonable jury" rule applied on motions for directed verdict. See *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479–480 (1943) (directed verdict should be granted when the evidence is such "that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict"). In the civil context, most courts treat the two standards identically, although some have found slight differences. See generally C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §§ 2532, 2713.1 (1983); J. Moore & J. Lucas, Moore's Federal Practice ¶¶ 50.03[4], 56.04[2] (1982). The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. *Ibid.*

In making reasonable-basis determinations, the Board may draw guidance from the summary judgment and directed verdict jurisprudence, although it is not bound by either. While genuine disputes about material historical facts should be left for the state court, plainly unsupportable inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected.

Although we leave the particular procedures for making reasonable-basis determinations entirely to the Board's discretion, we see no reason why the Board should want to hear all the employer's evidence in support of his state suit, or any more than necessary, if it can be determined at an early stage that the case involves genuine issues of material fact or law. In appropriate cases, the Board might prefer to rely on documentary evidence alone, as is done in civil practice with summary judgment motions. On the other hand, the Board might prefer to conduct a hearing.

Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the § 8(a)(1)–§ 8(a)(4) unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded.[12]

In the present case, the only disputed issues in the state lawsuit appear to be factual in nature. There will be cases, however, in which the state plaintiff's case turns on issues of state law or upon a mixed question of fact and law. Just as the Board must refrain from deciding genuinely disputed material factual issues with respect to a state suit, it likewise must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary.[13] While the Board need not stay its hand if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous, the Board should allow such issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted.

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[12] Let us assume, for example, that picketing employees distribute a leaflet accusing manager Doe of making a sexual advance on employee Roe on a specific date. Claiming that the leaflet is maliciously false, Doe sues for libel in state court. The Board's General Counsel then files a complaint alleging that the state suit is retaliatory and lacks a reasonable basis. At a hearing before an ALJ, Roe testifies that the accusation in the leaflet is true. If Doe fails to testify or to come forward with any evidence that the leaflet is maliciously false, or at least with an acceptable explanation why he cannot present such evidence, cf. Fed. Rule Civ. Proc. 56(f) (summary judgment may be denied if opponent needs time to discover essential facts), we see no reason why the Board should not enjoin Doe's suit for lack of a reasonable basis. In this situation, the state plaintiff has failed to show that there are any genuine issues for the state court to decide, and the inference that the suit is groundless is too strong to ignore, in light of the strong federal policy against deterring the exercise of employees' collective rights.

In contrast, suppose that Doe testifies and claims that he was elsewhere on the date of the alleged sexual incident. The question whether the libel suit has merit thus turns in substantial part on the truth or falsity of Doe's testimony. Under these circumstances, we doubt that Congress intended for the Board to resolve the credibility issue and perhaps to disbelieve Doe's story and enjoin the lawsuit for lack of a reasonable basis, thereby effectively depriving Doe of his right to have this factual dispute resolved by a state-court jury. The same would be true if the question turned on the proper factual inferences to be drawn from undisputed facts.

[13] The present case involves a libel claim, which, of course, is not governed entirely by state law, since federal law superimposes a malice requirement. *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 64–65 (1966).

In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the §8(a)(1) and §8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' §7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the Act. 29 U. S. C. §160(c).[14]

V

The Board argues that, since petitioner has not sought review of the factual findings below that the state suit in the present case lacked a reasonable basis and was filed for a

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[14] The Board's power to take such action is not limited by the availability to injured employees of a state-court malicious prosecution or other action. Dual remedies are appropriate because a State has a substantial interest in deterring the filing of baseless litigation in its courts, and the Federal Government has an equally strong interest in enforcing the federal labor laws. The Federal Government need not rely on state remedies to ensure that its interests are served.

retaliatory motive, the judgment should be affirmed once it
concluded that the Board may enjoin a suit under these c
cumstances. Petitioner does, however, challenge the rig
of the Board to issue a cease-and-desist order in the circu
stances present here, and the Board did not reach its reaso
able-basis determination in accordance with this opinion.
noted above, the ALJ had no reservations about weighi
the evidence and making credibility judgments. Based
his own evaluation of the evidence, he concluded that the lil
count in petitioner's suit lacked merit, because the sta
ments in the leaflet were true, and that the business interf
ence counts were groundless, because the evidence failed
support petitioner's factual allegations. 249 N. L. R. B.,
164–165. See *supra*, at 736. It was not the ALJ's provi
to make such factual determinations. What he should ha
determined is not whether the statements in the leaflet we
true, but rather whether there was a genuine issue as
whether they were knowingly false. Similarly, he shou
not have decided the facts regarding the business interf
ence counts; rather, he should have limited his inquiry to t
question whether petitioner's evidence raised factual issu
that were genuine and material. Furthermore, because,
enforcing the Board's order, the Court of Appeals ultimate
relied on the fact that "substantial evidence" supported t
Board's finding that the prosecution of the lawsuit v
lated the Act, 660 F. 2d, at 1343, the Board's error has n
been cured. Accordingly, without expressing a view as
whether petitioner's suit is in fact enjoinable, we shall retu
this case to the Board for further consideration in light of t
proper standards.

VI

To summarize, we hold that the Board may not halt t
prosecution of a state-court lawsuit, regardless of the plai
tiff's motive, unless the suit lacks a reasonable basis in fact
law. Retaliatory motive and lack of reasonable basis a
both essential prerequisites to the issuance of a cease-an

desist order against a state suit. The Board's reasonable-basis inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state-court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit. Therefore, if the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that such genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.

In view of the foregoing, the judgment of the Court of Appeals is vacated, and the case is remanded to that court with instructions to remand the case to the Board for further proceedings consistent with this opinion.[15]

So ordered.

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[15] On remand, the state court's denial of summary judgment on the libel count should be given careful consideration before a cease-and-desist order is issued, unless petitioner is deemed to have waived this point by failing to bring the state court's ruling to the attention of the ALJ prior to his decision. See nn. 2 and 3, *supra*. In the ordinary case, although the Board is not bound in a res judicata sense by such a state-court ruling, we see no reason why the state court's own judgment on the question whether the lawsuit presents triable factual issues should not be entitled to deference. In any event, such a state-court decision should not be disregarded without a cogent explanation for doing so.

Petitioner also argues that weight should be given to the fact that a Federal District Court denied the Board's petition for temporary injunctive relief. See *ibid.* At least in the context of the present case, we disagree, because here the District Court denied relief not because it felt that petitioner's lawsuit raised triable issues, but because it was of the erroneous

JUSTICE BRENNAN, concurring.

The Court holds today that the National Labor Relations Board may not enjoin the prosecution of a state-court lawsuit unless the suit lacks a "reasonable basis," *ante*, at 743, and, further, that to find that the suit lacks a reasonable basis on factual grounds the Board must find that there is no "genuine issue of material fact," *ante*, at 744–748. For me, those are no delphic pronouncements. They are standards that take their content from the basic structures of federal and state—and of administrative and judicial—authority over labor disputes, and they should not be read in an artificial way that ignores their provenance.

It is important to remember that our focus in this case is on the function of judicial review. On the one hand, the National Labor Relations Act constitutes the Board, and not this Court, the principal arbiter of federal labor policy.

> "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life. *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 798; *Phelps Dodge Corp.* v. *Labor Board*, [313 U. S. 177,] 194, and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.' *Labor Board* v. *United Steelworkers*, [357 U. S. 357,] 362–363. 'The ultimate problem is the balancing of the conflicting

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view that a state suit could never be enjoined unless it sought "an unlawful objective, as, for example, when a union sues to enforce an unlawful contract." App. to Brief for Petitioner C5.

It appears that only the libel count remains pending before the state court. If petitioner's other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose.

legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' *Labor Board* v. *Truck Drivers Union*, 353 U. S. 87, 96." *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963).[1]

Thus, in reviewing the Board's construction of the Act and the remedy it has provided to effectuate the purposes of the Act, our task

> "[is] not to interpret that statute as [we think] best but rather the narrower inquiry into whether the [NLRB]'s construction was 'sufficiently reasonable' to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 75 (1975); *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). To satisfy this standard it is not necessary for a court to find the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 39 (1981).

On the other hand, this Court's responsibility for interpretation of the labor laws comes particularly into play when the Board's exercise of its broad mandate to develop federal labor policy has constitutional resonances. I do not suggest that a constitutional issue surfaces directly in this case. But we have often observed that Congress left much unsaid as to the effect of federal labor law on the delicate relationships between institutional policy and individual rights, and between State and Federal Governments, without intending to exercise the full measure of its constitutional power to regulate those relationships. See, *e. g.*, *Garner* v. *Teamsters*, 346 U. S. 485, 488 (1953). In construing how far the Act goes in depriving workers and employers of rights they would otherwise have under state law, we have often sought guidance from basic constitutional norms, on the theory that in the absence of more specific evidence they supply the surest indication of what Congress intended.

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[1] As was said of the Federal Election Commission in *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 37 (1981), the NLRB is also "precisely the type of agency to which deference should presumptively be afforded." It is "vested . . . with 'primary and substantial responsibility for administering and enforcing the Act,'" and it is provided with "'extensive rulemaking and adjudicative powers.'" *Ibid.* "It is authorized to 'formulate general policy with respect to the administration of this Act.'" *Ibid.* See also *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266–267 (1975).

It is in this spirit that the "reasonable basis" and "genuine material dispute" standards must be understood. They are phrases that encapsulate a complex judgment as to what limits a court may infer on the Board's broad authority to set federal labor policy and to vindicate that policy by enjoining prosecution of a state lawsuit.[2] More specific meaning can be derived from close attention to the particular constitutional considerations upon which they are based.

We have recognized a right under the First Amendment to seek redress of grievances in state courts. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972). Congress can and does pre-empt some state causes of action by providing for exclusive federal jurisdiction over certain types of disputes, see, *e. g.*, 28 U. S. C. § 1338(a); 40 U. S. C. § 270b(b), but such complete pre-emption is not lightly implied. We have also held that Congress has *not* completely pre-empted the right to sue in state court for defamation that occurs in connection with a labor dispute. *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966). Accordingly, it is appropriate to infer in a case implicating First Amendment rights, as here, that Congress did not intend to authorize the NLRB to enjoin the prosecution of an unpreempted state-court lawsuit, even if the plaintiff's subjective intent is to frustrate the operation of federal labor law, except where the plaintiff's First Amendment interests are at their weakest—where the suit is without a reasonable basis in fact or law. However, as the Court makes clear, *ante,* at 741, 749, the Board's ability to *enjoin* prosecution of a state suit is not the measure of its ability to determine that such prosecution constitutes an unfair labor practice or of its ability to provide other remedies to vindicate federal labor policy. Cf. *New York Times Co.* v. *United States,* 403 U. S. 713, 733 (1971) (WHITE, J., concurring) ("failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication"). As to the necessity and the scope of these remedies, the Board is entitled to a high degree of deference.[3]

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[2] Justice Frankfurter, writing for the Court, astutely observed that interpreting the National Labor Relations Act involves "a more complicated and perceptive process than is conveyed by the delusive phrase, 'ascertaining the intent of the legislature.'" *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 239–240 (1959).

Somewhat different concerns affect the standards and procedures by which the Board makes its "reasonable basis" determination. While the Constitution protects a person's right to file and to prosecute a lawsuit in state court, it does not guarantee that state law, rather than federal law, will provide the ground for decision. In fact, with regard to labor disputes, federal pre-emption of state law is the rule, not the exception. That pre-emption may be accomplished by congressionally authorized administrative action as well as by legislation. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta,* 458 U. S. 141, 153 (1982). Even in areas where state law is not pre-empted, there may be a federal overlay—as with defamation actions like the one involved in this case, which are limited by a federal requirement that malice be proved. See *Linn*, *supra*, at 61.

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[3] Reasonable people could differ over the wisdom of deciding that a nonfrivolous suit which is withdrawn, or in which the plaintiff ultimately does not prevail, constitutes an unfair labor practice, see *ante,* at 749, but that is a question of labor policy for the Board to decide in the first instance.

Nor does the Constitution guarantee that particular questions of fact will be decided by a state jury. To the extent that a litigant has an "interest in having the factual dispute resolved by a jury," *ante*, at 745, that interest is completely derivative from the State's interest in providing a particular cause of action with particular procedures. Yet that "State's right" may be pre-empted by federal law whenever Congress or its authorized agent determines that the federal interest in labor relations, in industries affecting commerce, requires different rules.

> "[W]hen it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 288 (1971).

See also *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242–243 (1959); *Garner* v. *Teamsters*, *supra*, at 490–491.

That is not to say that Congress has authorized the Board to disregard altogether state-created rights to jury determinations on factual issues and to state-court rulings on state law that has not been pre-empted. *Linn* and its progeny make clear that it has not. The NLRA requires some accommodation of state interests; the question is how much. The most reasonable inference to draw from the structure of state-federal relations in this area is that the Board may enjoin prosecution of a state lawsuit if, in addition to whatever other findings are required to decide that an unfair labor practice has been committed, it determines that controlling federal law bars the plaintiff's right to relief, that clear state law makes the case frivolous, or that no reasonable jury could make the findings of fact in favor of the plaintiff that are necessary under applicable law. I can understand the phrase "genuine material disputes," *ante*, at 749, no other way. With regard to questions of fact, which are crucial in this case, see *ante*, at 746, *Jackson* v. *Virginia*, 443 U. S. 307 (1979), provides an analogy for the proper allocation of factfinding authority to those charged with protecting federal rights. A state lawsuit may be regarded as having no reasonable basis if no reasonable factfinder could give a verdict for the plaintiff. Even if a State has some interest in entertaining frivolous lawsuits or providing unreasonable juries, that interest need not prevent swift, effective vindication of federal labor policy.

The scope of our review of the *procedures* the Board uses to accomplish its mission is limited, and the constitutional constraints on them are attenuated. Unless the agency goes entirely beyond its statutory mandate, violates its own procedures, or fails to provide an affected party due process of law, we have no role in specifying what methods it may or may not use in finding facts or reaching conclusions of law and policy. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 548–549 (1978). The Court acknowledges this and notes that "we leave the particular procedures for making reasonable-basis determinations entirely to the Board's discretion." *Ante*, at 745, n. 11. Specifically, the Board may take evidence, although it need not do so in every case, nor would it be wise to do so in every case. *Ibid.*

Thus, the Board retains broad power to deal with the ways in which resort to judicial process may be used as a "powerful instrument of coercion or retaliation," *ante*, at 740. There is no constitutionally privileged method of harassing or punishing those who exercise rights protected by §§ 7 and 8 of the NLRA. The Board may not enjoin prosecution of an unpreempted state lawsuit unless it finds that the suit has no reasonable basis, and it may not decide that a suit has no reasonable basis in fact if a reasonable jury could view the facts differently. But it may take other measures which have less direct impact on the plaintiff's First Amendment rights, and it may investigate the matter to the full extent it deems necessary to vindicate the federal interest in protecting participants in labor disputes from coercive state-court lawsuits.

W. R. GRACE & CO. *v.* LOCAL UNION 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1314. Argued February 28, 1983—Decided May 31, 1983

Faced with the prospect of liability for violations of Title VII of the Civil Rights Act of 1964 in its hiring practices, petitioner employer signed with the Equal Employment Opportunity Commission (EEOC) a conciliation agreement that conflicted with the seniority provisions of petitioner's existing collective-bargaining agreement with respondent union. Petitioner sued in Federal District Court to enjoin arbitration of certain employee grievances under the collective-bargaining agreement. The District Court held that the conciliation agreement should prevail with respect to layoffs of employees in conflict with the seniority provisions of the collective-bargaining agreement. The Court of Appeals reversed and compelled petitioner to arbitrate. Among the grievances arbitrated were those of two employees who had been laid off pursuant to the conciliation agreement and in violation of the collective-bargaining agreement. The arbitrator awarded backpay damages against petitioner under the collective-bargaining agreement, interpreting that agreement as not requiring him to follow a contrary prior arbitration award involving the same contractual issue, as providing that the District Court's order did not extinguish petitioner's liability for its breach, and as not providing a good-faith defense to claims of violation of its seniority provisions. Petitioner then brought an action to overturn the award, and the District Court entered summary judgment for petitioner, finding that public policy prevented enforcement of the collective-bargaining agreement during the period prior to the Court of Appeals' reversal in the prior action. The Court of Appeals reversed.

Held: The award in question is properly to be enforced. Pp. 764–772.

(a) A federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the collective-bargaining agreement would be the better one. Thus, here, regardless of what this Court's view might be of the correctness of the arbitrator's contractual interpretation, petitioner and respondent bargained for that interpretation, and a federal court may not second-guess it. The arbitrator's analysis of the merits of the grievance is entitled to the same deference. Pp. 764–766.

(b) Enforcement of the collective-bargaining agreement as interpreted by the arbitrator will not compromise the public policy requiring obedience to a court order. Even assuming that the District Court's order that the conciliation agreement should prevail was a mandatory injunction, nothing in the collective-bargaining agreement as interpreted by the arbitrator required petitioner to violate that order. The arbitrator's award neither mandated layoffs nor required that layoffs be conducted according to the collective-bargaining agreement, but simply held retrospectively that the employees were entitled to damages for the prior breach of the seniority provisions. Petitioner was cornered by its own actions and cannot now argue that liability under the collective-bargaining agreement violates public policy. No public policy is violated by holding petitioner to its collective-bargaining agreement obligations, which bar petitioner's attempted reallocation to union members of the burden of the losses resulting from petitioner's employment discrimination. Pp. 766–770.

(c) Nor will enforcement of the arbitrator's award inappropriately affect the public policy favoring voluntary compliance with Title VII. Although petitioner and the EEOC agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include respondent. Absent a judicial determination, the EEOC, not to mention petitioner, cannot alter the collective-bargaining agreement without respondent's consent. Pp. 770–772.

652 F. 2d 1248, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Peter G. Nash argued the cause for petitioner. With him on the briefs were *Dixie L. Atwater* and *Kevin T. O'Reilly*.

Carter G. Phillips argued the cause for the Equal Employment Opportunity Commission as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee* and *Deputy Solicitor General Wallace*.

Laurence Gold argued the cause for respondent. With him on the brief were *Danny E. Cupit*, *Charles Armstrong*, *Michael H. Gottesman*, and *Robert M. Weinberg*.*

**Robert E. Williams*, *Douglas S. McDowell*, and *Jeffrey C. McGuiness* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

JUSTICE BLACKMUN delivered the opinion of the Court.

Faced with the prospect of liability for violations of Title VII of the Civil Rights Act of 1964, as amended, petitioner signed with the Equal Employment Opportunity Commission (Commission or EEOC) a conciliation agreement that was in conflict with its collective-bargaining agreement with respondent. Petitioner then obtained a court order, later reversed on appeal, that the conciliation agreement should prevail. The issue presented is whether the Court of Appeals was correct in enforcing an arbitral award of backpay damages against petitioner under the collective-bargaining agreement for layoffs pursuant to the conciliation agreement.

I

A

In October 1973, after a lengthy investigation, the EEOC's District Director determined that there was reasonable cause to believe that petitioner W. R. Grace and Company (Company) had violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §§2000e to 2000e–17 (1976 ed. and Supp. V), by discriminating in the hiring of Negroes and women at its Corinth, Miss., plastics manufacturing facility. App. 2. In addition, the Director found that the departmental and plantwide seniority systems, mandated by the Company's collective-bargaining agreement with respondent Local Union No. 759 (Union), were unlawful because they perpetuated the effects of the Company's past discrimination. The Company was invited, pursuant to §706(b) of the Act, 42 U. S. C. §2000e–5(b), to conciliate the dispute. Although the Commission also invited the Union to participate, the Union declined to do so.

B

A collective-bargaining agreement between petitioner and respondent expired in March 1974, and failed negotiations led to a strike. The Company hired strike replacements, some of whom were women who took Company jobs never before held by women. The strike was settled in May with the signing of a new agreement that continued the plant seniority system specified by the expired agreement. The strikers returned to work, but the Company also retained the strike replacements. The women replacements were assigned to positions in the Corinth plant ahead of men with greater seniority. Specifically, the Company prevented men from exercising the shift preference seniority (to which they were entitled under the collective-bargaining agreement) to obtain positions held by the women strike replacements. The men affected by this action filed grievances under the procedures established by the collective-bargaining agreement.

The Company refused to join the ultimate arbitration. Instead, it filed an action under § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185, in the United States District Court for the Northern District of Mississippi. The Company sought an injunction prohibiting arbitration of the grievances while the Company negotiated a conciliation agreement with the Commission. The Union counterclaimed to compel arbitration.

Before the District Court took any action, the Company and the Commission signed a conciliation agreement dated December 11, 1974. App. 10. In addition to ratifying the Company's position with respect to the shift preference dispute, the conciliation agreement provided that in the event of layoffs, the Company would maintain the existing proportion of women in the plant's bargaining unit. *Id.*, at 15–16. The Company then amended its § 301 complaint to add the Commission as a defendant and to request an injunction barring the arbitration of grievances seeking relief that conflicted with the terms of the conciliation agreement. The Commission cross-claimed against the Union and counterclaimed against the Company for a declaratory judgment that the conciliation agreement prevailed, or, in the alternative, for a declaratory judgment that the seniority provisions were not a bona fide seniority system protected by § 703(h) of the Civil Rights Act, 78 Stat. 259, 42 U. S. C. § 2000e–2(h).[1]

While cross-motions for summary judgment were under consideration, the Company laid off employees pursuant to the conciliation agreement. Several men affected by the layoff, who would have been protected under the seniority provisions of the collective-bargaining agreement, filed grievances. In November 1975, with the Company still refusing to arbitrate, the District Court granted summary judgment for the Commission and the Company. It held that under Title VII the seniority provisions could be modified to alleviate the effects of past discrimination. *Southbridge Plastics Division, W. R. Grace & Co.* v. *Local 759*, 403 F. Supp. 1183, 1188 (1975). The court declared that the terms of the conciliation agreement were binding on all parties and that "all parties . . . shall abide thereby." App. 44.[2] The Union appealed, and no party sought a stay.

With the Union's appeal pending before the United States Court of Appeals for the Fifth Circuit, the Company, following the terms of the conciliation agreement, laid off more employees. Again, adversely affected male employees filed grievances. In January 1978, over two years after the District Court's decision, the Court of Appeals reversed. *Southbridge Plastics Division, W. R. Grace & Co.* v. *Local 759*, 565 F. 2d 913. Applying *Teamsters* v. *United States*, 431 U. S. 324 (1977), which was decided after the District Court's decision, the Court of Appeals held that because the seniority system was not animated by a discriminatory purpose, it was lawful and could not be modified without the Union's consent. 565 F. 2d, at 916. The court granted the Union's counterclaim, compelling the Company to arbitrate the grievances.

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[1] The Company's amended complaint, unlike the Commission's pleadings, did not expressly request a declaratory judgment under 28 U. S. C. §§ 2201 and 2202. See App. in *Southbridge Plastics Division, W. R. Grace & Co.* v. *Local 759*, No. 75–4416 (CA5), pp. 98, 123–124, 129–130. The United States Court of Appeals for the Fifth Circuit, however, viewed the Company's complaint as seeking a declaration of its obligations under the respective contracts. See 565 F. 2d 913, 915 (1978).

[2] The relevant text of the order is as follows:

"(1) The terms of the conciliation agreement executed on December 11, 1974, by the plaintiff and the defendant, EEOC, are binding upon all the parties to this action; and

"(2) Where the provisions of the collective bargaining agreement executed by the plaintiff and defendant, Local 759, conflict with the provisions of the conciliation agreement executed by the plaintiff and defendant, EEOC, the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby." App. 44.

In response to this decision, the Company reinstated the male employees to the positions to which they were entitled under the collective-bargaining agreement. The pending grievances, seeking backpay, then proceeded to arbitration. The first to reach arbitration was that of a male employee who had been demoted while the District Court order was in effect. Arbitrator Anthony J. Sabella, in August 1978, concluded that although the grievant was entitled to an award under the collective-bargaining agreement, it would be inequitable to penalize the Company for conduct that complied with an outstanding court order. App. 45. He thus denied the grievance. *Id.*, at 47. Instead of filing an action to set aside that award, the Union chose to contest Sabella's reasoning in later arbitrations.

C

The next grievance to be arbitrated resulted in the award in dispute here. *Id.*, at 48. Arbitrator Gerald A. Barrett was presented with the complaints of two men who had been laid off before, and one man who had been laid off after, the entry of the District Court order.[3] Acknowledging that the Sabella arbitration resolved the same contractual issue, *id.*, at 51, Barrett first considered whether the collective-bargaining agreement required him to follow the Sabella arbitration award. He concluded that it did not. The collective-bargaining agreement limited the arbitrator's authority, Barrett found, to considering whether the express terms of the contract had been violated.[4] Because Sabella had considered the fairness of enforcing the terms of the contract, he had acted outside his contractually defined jurisdiction. *Id.*, at 55–56. Barrett determined that the finality clause of the collective-bargaining agreement[5] therefore did not require him to follow Sabella's award. *Ibid.*

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[3] Neither the parties nor the District Court nor the Court of Appeals attached significance to this distinction between the grievants. See Brief for EEOC as *Amicus Curiae* 6, n. 6. Our resolution of the case eliminates any need to consider it.

Arbitrator Barrett then turned to the grievances before him. The Company did not dispute that it had violated the seniority provisions of the collective-bargaining agreement,[6] *id.*, at 56, and Barrett also accepted the Company's contention that it had acted in good faith in following the conciliation agreement. He found, however, that the collective-bargaining agreement made no exception for good-faith violations of the seniority provisions, and that the Company had acted at its own risk in breaching the agreement. The Company, he held, could not complain that the law ultimately had made this out to be an unfortunate decision. *Ibid.* In essence, Barrett interpreted the collective-bargaining agreement as providing that the District Court's order did not extinguish the Company's liability for its breach.

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[4] The 1974 collective-bargaining agreement and the succeeding 1977 agreement each defined the arbitrator's jurisdiction as follows:

"The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement." Art. IV, § 3; App. 19, 31.

[5] The finality clause in each of the 1974 and 1977 collective-bargaining agreements provided in relevant part: "The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company." Art. IV, § 4; App. 20, 32.

[6] The 1974 and 1977 collective-bargaining agreements each provided: "If it is determined in the grievance procedure that an employee has been unjustly discharged or suspended the employee shall be reinstated to his former job and shall be compensated at his regular hourly earnings for the time lost less any penalty time decided upon." Art. IV, § 7(a); App. 21, 32–33.

D

The Company then instituted another action under § 301 of the Labor Management Relations Act to overturn the award. The United States District Court for the Northern District of Mississippi entered summary judgment for the Company, finding that public policy prevented enforcement of the collective-bargaining agreement during the period prior to the Court of Appeals' reversal. App. 58–69. The United States Court of Appeals for the Fifth Circuit reversed. 652 F. 2d 1248 (1981). We granted certiorari to decide the important issue of federal labor law that the case presents. 458 U. S. 1105 (1982).

II

The sole issue before the Court is whether the Barrett award should be enforced. Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960). When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," *id.*, at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. *Id.*, at 598.

Under this standard, the Court of Appeals was correct in enforcing the Barrett award, although it seems to us to have taken a somewhat circuitous route to this result.[7] Barrett's initial conclusion that he was not bound by the Sabella decision was based on his interpretation of the bargaining agreement's provisions defining the arbitrator's jurisdiction and his perceived obligation to give a prior award a preclusive effect. See nn. 4 and 5, *supra.* Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator. Barrett's conclusions that Sabella acted outside his jurisdiction and that this deprived the Sabella award of precedential force under the contract draw their "essence" from the provisions of the collective-bargaining agreement. Regardless of what our view might be of the correctness of Barrett's contractual interpretation, the Company and the Union bargained for that interpretation. A federal court may not second-guess it. *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S., at 599.

Barrett's analysis of the merits of the grievances is entitled to the same deference. He found that the collective-bargaining agreement provided no good-faith defense to claims of violations of the seniority provisions, and gave him no authority to weigh in some other fashion the Company's good faith. Again, although conceivably we could reach a different result were we to interpret the contract ourselves,[8] we cannot say that the award does not draw its essence from the collective-bargaining agreement.

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[7] Although the court believed that the validity of the Sabella award was the dispositive issue, 652 F. 2d, at 1252, the Union raised and argued the question whether the Barrett award itself was enforceable. Brief for Appellant in No. 80-3661 (CA5), pp. 18-30. We disagree with the court's initial premise that the validity of the Sabella award is relevant. Only the enforceability of the Barrett award is at issue.

[8] The 1974 and 1977 collective-bargaining agreements each contained a clause that provided: "In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions." Art. XIV, § 7; App. 29, 42. Before the Court of Appeals, the Company argued that under this "legality" clause the seniority provision was superseded by

III

As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. See *Hurd* v. *Hodge*, 334 U. S. 24, 34–35 (1948). Barrett's view of his own jurisdiction precluded his consideration of this question, and, in any event, the question of public policy is ultimately one for resolution by the courts. See *International Brotherhood of Teamsters* v. *Washington Employers, Inc.*, 557 F. 2d 1345, 1350 (CA9 1977); *Local 453* v. *Otis Elevator Co.*, 314 F. 2d 25, 29 (CA2), cert. denied, 373 U. S. 949 (1963); Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Colum. L. Rev. 267, 287 (1980). If the contract as interpreted by Barrett violates some explicit public policy, we are obliged to refrain from enforcing it. *Hurd* v. *Hodge*, 334 U. S., at 35. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany* v. *United States*, 324 U. S. 49, 66 (1945).

A

It is beyond question that obedience to judicial orders is an important public policy. An injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn. *Walker* v. *City of Birmingham*, 388 U. S. 307, 313–314 (1967); *United States* v. *Mine Workers*, 330 U. S. 258, 293–294 (1947); *Howat* v. *Kansas*, 258 U. S. 181, 189–190 (1922). A contract provision the per-

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the District Court's determination that the provision was illegal. The Court of Appeals responded that its decision reversing the District Court had retroactive effect because it declared the law as it always had existed. 652 F. 2d, at 1255. It seems to us, however, that the Company's argument was that the court should interpret the legality clause itself, a privilege not permitted to federal courts in reviewing an arbitral award.

formance of which has been enjoined is unenforceable. See Restatement (Second) of Contracts §§ 261, 264 (1981). Here, however, enforcement of the collective-bargaining agreement as interpreted by Barrett does not compromise this public policy.

Given the Company's desire to reduce its work force, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective-bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations. When the Union attempted to enforce its contractual rights, the Company sought a judicial declaration of its respective obligations under the contracts. During the course of this litigation, before the legal rights were finally determined,[9] the Company again laid off employees and dishonored its contract with the Union. For these acts, the Company incurred liability for breach of contract. In effect, Barrett interpreted the collective-bargaining agreement to allocate to the Company the losses caused by the Company's decision to follow the District Court order that proved to be erroneous.[10]

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[9] We do not decide whether some public policy would be violated by an arbitral award for a breach of seniority provisions ultimately found to be illegal under *Teamsters* v. *United States*, 431 U. S. 324, 355–356 (1977). Neither do we decide whether such an award could be enforced in the face of a valid judicial alteration of seniority provisions, pursuant to *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 778–779 (1976), to provide relief to discriminatees under Title VII or other law. See *Dennison* v. *City of Los Angeles Department of Water and Power*, 658 F. 2d 694, 695–696 (CA9 1981); *EEOC* v. *McCall Printing Corp.*, 633 F. 2d 1232, 1237 (CA6 1980).

[10] Although Barrett could have considered the District Court order to cause impossibility of performance and thus to be a defense to the Company's breach, he did not do so. Impossibility is a doctrine of contract in-

Even assuming that the District Court's order was a mandatory injunction,[11] nothing in the collective-bargaining agreement as interpreted by Barrett required the Company to violate that order. Barrett's award neither mandated layoffs[12] nor required that layoffs be conducted according to the

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terpretation. See 18 W. Jaeger, Williston on Contracts §§ 1931–1979 (3d ed. 1978). For the reasons stated in the text, we cannot revise Barrett's implicit rejection of the impossibility defense. Even if we were to review the issue *de novo*, moreover, it is far from clear that the defense is available to the Company, whose own actions created the condition of impossibility. See *id.*, § 1939, p. 50; Uniform Commercial Code § 2–615(a) and Comment 10, 1A U. L. A. 335, 338 (1976); *Lowenschuss* v. *Kane*, 520 F. 2d 255, 265 (CA2 1975).

[11] As a threshold matter, we doubt that the District Court in this case ordered specific performance of the conciliation agreement or granted any other type of injunctive relief. That court, in "considering the declaratory relief sought," 403 F. Supp., at 1187, stated that the issue was "whether the terms of the conciliation agreement override the terms of the bargaining agreement." *Ibid.* Both the Company's amended complaint and the Union's counterclaim invoked only the cause of action provided by § 301 of the Labor Management Relations Act. Although the Commission filed a counterclaim against the Company alleging that the Company had violated Title VII, the Court of Appeals treated the case as a § 301 action. See 565 F. 2d, at 917. See generally *Airline Stewards & Stewardesses Assn.* v. *American Airlines, Inc.*, 573 F. 2d 960, 963 (CA7) (judicial review of Title VII settlement agreement is not review of judgment of Title VII liability after trial), cert. denied, 439 U. S. 876 (1978). Consistent with this view, the court expressly stated that the action was not brought under Title VII, 565 F. 2d, at 917, and refused to remand to permit individual women employees to meet the standards set forth in *Teamsters* v. *United States*, 431 U. S. 324 (1977). See 565 F. 2d, at 917. Thus, the courts had no occasion to order injunctive relief under Title VII. The decision of the District Court instead seems to be a declaration of the rights and obligations of the parties under the conflicting agreements, and not a mandatory injunction. Given the ambiguity, however, we assume for purposes of decision that the District Court's order constituted an injunction.

[12] Economic necessity is not recognized as a commercial impracticability defense to a breach-of-contract claim. Uniform Commercial Code § 2–615, Comment 4, 1A U. L. A. 336 (1976) (increased cost of performance does not constitute impossibility); 18 W. Jaeger, Williston on Contracts § 1931, pp. 7–8 (3d ed. 1978) (same). Thus, while it may have been economic mis-

collective-bargaining agreement. The award simply held, retrospectively, that the employees were entitled to damages for the prior breach of the seniority provisions.[13]

In this case, the Company actually complied with the District Court's order, and nothing we say here causes us to believe that it would disobey the order if presented with the same dilemma in the future. Enforcement of Barrett's award will not create intolerable incentives to disobey court orders. Courts have sufficient contempt powers to protect their injunctions, even if the injunctions are issued erroneously. See *Walker* v. *City of Birmingham*, 388 U. S., at 315. In addition to contempt sanctions, the Company here was faced with possible Title VII liability if it departed

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fortune for the Company to postpone or forgo its layoff plans, its extant, conflicting, and voluntarily assumed contractual obligations exposed it to liability regardless of the layoff procedure it followed. In order to avoid liability under either contract, the Company, of course, could have accepted the economic losses of forgoing its reduction-in-force plans.

This is not to say that in the face of the economic necessity of the layoffs, the Company had no way whatsoever to avoid the injury. Prior to conducting the layoffs, the Company could have requested a stay from the District Court to permit it to follow the collective-bargaining agreement pending review by the Court of Appeals. It was the Company, which had sought the declaration of rights and obligations, and which chose to act before the determination of its respective contractual obligations was final; the Union most likely would have preferred that no layoffs occur at all. Although the Union could have requested a stay, there is no rule requiring a party to ask for prospective relief from a possible contractual breach. The Union justifiably relied on its right to backpay damages. Moreover, the Company, in future contract negotiations, may seek to bargain for a contract provision expressly allocating the loss to its employees in a case such as this one.

[13] Compensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy. Restatement (Second) of Contracts § 365, Comment *a* (1981). This principle is particularly applicable here; since the employees' Union had no responsibility for the events giving rise to the injunction, and entered into the collective-bargaining agreement ignorant of any illegality, the employees are not precluded from recovery for the breach. *Id.*, § 180, Comment *a*.

from the conciliation agreement in conducting its layoffs. The Company was cornered by its own actions, and it cannot argue now that liability under the collective-bargaining agreement violates public policy.

Nor is placing the Company in this position with respect to the court order so unfair as to violate public policy. Obeying injunctions often is a costly affair.[14] Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses. As interpreted by Barrett, the collective-bargaining agreement placed this unavoidable burden on the Company. By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from performing the collective-bargaining agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrators' interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the burden.

B

Voluntary compliance with Title VII also is an important public policy. Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). Critical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation, and persuasion before a Title VII plaintiff or the Commission may bring suit. See § 706(b) of the Act, 42 U. S. C. § 2000e–5(b).

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[14] A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond. *Russell* v. *Farley*, 105 U. S. 433, 437 (1882); *Buddy Systems, Inc.* v. *Exer-Genie, Inc.*, 545 F. 2d 1164, 1167–1168 (CA9 1976), cert. denied, 431 U. S. 903 (1977). Enforcing the Barrett award to compensate the injuries suffered by the male employees does not violate this principle. The only party injured by the injunction itself has been the Company; the proof of this is that if the Company had done nothing at all, see n. 12, *supra*, the economic loss from failing to reduce the work force would have fallen on the Company. By an independent and voluntary act, the Company shifted this loss to its male employees and thereby caused the injury remedied by the Barrett award.

Enforcement of the Barrett award will not inappropriately affect this public policy. In this case, although the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent. See *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 44 (Commission's power to investigate and conciliate does not have coercive legal effect). Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored. *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 509 (1962). Although the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.

Aside from the legality of conferring such power on the Commission and an employer, it would be unlikely to further true conciliation between all interested parties. Although an innocent union might decide to join in Title VII conciliation efforts in order to protect its contractual position, neither the employer nor the Commission would have any incentive to make concessions to the union. The Commission and the employer would know that they could agree without the union's consent and that their agreement would be enforced.

In fact, enforcing the award here should encourage conciliation and true voluntary compliance with federal employment discrimination law. If, as in this case, only the employer faces Title VII liability, the union may enter the conciliation process with the hope of obtaining concessions in exchange for helping the employer avoid a Title VII suit. If, however, both the union and the employer are potentially liable, it would be in their joint interests to work out a means to share the burdens imposed by the Commission's demands. On this view, the conciliation process of Title VII and the collective-bargaining process complement each other, rather than conflict.

IV

For the foregoing reasons, the Barrett award is properly to be enforced. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

BELL, SECRETARY OF EDUCATION *v.* NEW JERSEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-2125. Argued April 18, 1983—Decided May 31, 1983

Respondent States received funds as part of the federal grant-in-aid program under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), a program designed to improve the educational opportunities available to disadvantaged children. Subsequently, federal auditors determined that each State had misapplied the funds. The Education Appeal Board (Board), while modifying the auditors' findings, assessed deficiencies against both States. The Secretary of Education (Secretary) declined to review the orders establishing the deficiencies, and, after a period for comment, the orders became final. Both States filed petitions for review in the Court of Appeals, which consolidated the cases and held that the Department of Education did not have the authority to issue the orders.

Held:

1. The Court of Appeals had jurisdiction of the cases under both § 195 of ESEA—which permits judicial review in the courts of appeals of the Secretary's final action with respect to audits—and § 455 of the General Education Provisions Act (GEPA)—which permits such review of actions of the Board. In the absence of an appealable collateral order, federal courts may exercise jurisdiction only over a final order of the Department of Education. Here, the fact that the Board's order merely established the amount of the deficiencies, leaving for further "discussion" the method of repayment, did not render the orders less than "final." The agency's determination of the deficiencies represented a definitive statement of its position, determining the rights and obligations of the parties. Pp. 777–780.

2. The provisions of § 207(a)(1) of ESEA and § 415 of GEPA—which required payments of federal grants to States under ESEA to take into account or make adjustments for any overpayments or underpayments in previous grants—in effect during the periods in which the audits in these cases were conducted gave the Government the right to recover misused funds granted to a State under Title I of ESEA. Pp. 780–790.

(a) The plain language of the statutes recognized this right, and the legislative history supports this reading. Pp. 782–787.

(b) Even if § 415 were interpreted to cover payments made "accidently," it covers misused payments. Grants of misused funds result from the "accident" of the Secretary's reliance on assurances by the State that it will use the funds in a program that complies with Title I, when in fact the recipient misuses the funds. P. 787.

(c) To construe §§ 207(a)(1) and 415 to provide for liability does not leave meaningless § 185 of the Education Amendments of 1978, which was enacted after the audits here occurred and makes explicit the Secretary's authority to recover funds misspent by the recipient State. On the contrary, § 185 plays an important role in specifying the procedures to be followed in determining the amount of the deficiency and in collecting it. Pp. 788–790.

3. Imposition of liability for misused funds does not interfere with state sovereignty in violation of the Tenth Amendment. Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of the funds does not intrude on their sovereignty. If the conditions for receiving the funds are valid, the State has no sovereign right to retain the funds without complying with those conditions. Pp. 790–791.

4. The initial determination of the existence and amount of the liability for funds misused by a State is to be made administratively by the Department of Education. And the State may seek judicial review of such determination in the courts of appeals as to whether the Secretary's findings are supported by substantial evidence and reflect application of the proper legal standards. Pp. 791–792.

662 F. 2d 208, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 793.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Harriet S. Shapiro*, *William Kanter*, and *Susan M. Chalker*.

Margaret Hunting, Deputy Attorney General, argued the cause for respondent Commonwealth of Pennsylvania. With her on the brief were *LeRoy S. Zimmerman*, Attorney General, and *Emogene L. Trexel*. *Michael R. Cole*, Assistant Attorney General, argued the cause for respondent State of New Jersey. With him on the brief were *Irwin I. Kimmelman*, Attorney General, *Mary Ann Burgess*, Assistant Attorney General, and *Jaynee La Vecchia* and *Regina Murray Mahoney*, Deputy Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider both the rights of the Federal Government when a State misuses funds advanced as part of a federal grant-in-aid program under Title I of the Elementary and Secondary Education Act and the manner in which the Government may assert those rights. We hold that the Federal Government may recover misused funds, that the Department of Education may determine administratively the amount of the debt, and that the State may seek judicial review of the agency's determination.

I

The respondents, New Jersey and Pennsylvania, received grants from the Federal Government under Title I of the Ele-

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**Richard C. Dinkelspiel*, *William L. Robinson*, *Beatrice Rosenberg*, and *Norman J. Chachkin* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *Stephen H. Sachs*, Attorney General of Maryland, *Paul F. Strain*, Deputy Attorney General, *Diana G. Motz* and *Ellen M. Heller*, Assistant Attorneys General, and *E. Stephen Derby; William A. Allain*, Attorney General of Mississippi; *Gerald L. Baliles*, Attorney General of Virginia; *Paul G. Bardacke*, Attorney General of New Mexico; *Francis X. Bellotti*, Attorney General of Massachusetts; *Steven L. Beshear*, Attorney General of Kentucky; *Chauncey H. Browning*, Attorney General of West Virginia; *Paul L. Douglas*, Attorney General of Nebraska; *John J. Easton, Jr.*, Attorney General of Vermont; *Rufus L. Edmisten*, Attorney General of North Carolina; *Dave Frohnmayer*, Attorney General of Oregon; *Thomas M. Griffin; Neil F. Hartigan*, Attorney General of Illinois; *Tany S. Hong*, Attorney General of Hawaii; *James Mattox*, Attorney General of Texas; *Brian McKay*, Attorney General of Nevada; *Thomas J. Miller*, Attorney General of Iowa; *Charles M. Oberly III*, Attorney General of Delaware; *Linley E. Pearson*, Attorney General of Indiana; *Sheldon Elliott Steinbach; James E. Tierney*, Attorney General of Maine; *Michael C. Turpen*, Attorney General of Oklahoma; and *Robert O. Wefald*, Attorney General of North Dakota; for the National Association of Counties et al. by *Robert N. Sayler;* and for the College of the Sequoias et al.

mentary and Secondary Education Act of 1965 (ESEA), Pub. L. 89–10, 79 Stat. 27, as amended, 20 U. S. C. § 2701 *et seq.* (1976 ed., Supp. V). Title I created a program designed to improve the educational opportunities available to disadvantaged children. § 102, 20 U. S. C. § 2702 (1976 ed., Supp. V). Local educational agencies obtain federal grants through state educational agencies, which in turn obtain grants from the Department of Education[1] upon providing assurances to the Secretary that the local educational agencies will spend the funds only on qualifying programs. § 182(a), 20 U. S. C. § 2832(a) (1976 ed., Supp. V).[2] In auditing New Jersey for the period September 1, 1970, through

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[1] The Department of Education was not created until 1980. Pub. L. 96–88, 93 Stat. 668, 20 U. S. C. § 3401 *et seq.* (1976 ed., Supp. V). The agency involved in many of the events relevant to this litigation was the predecessor, the Office of Education, and the official involved was the Commissioner of Education. For simplicity, unless the distinction is significant, we will refer to both the Office of Education and the Department of Education as the Department of Education and to both the Commissioner of Education and the Secretary of Education as the Secretary of Education. Similarly, we refer to both the Title I Audit Hearing Board and its successor, the Education Appeal Board, as the Education Appeal Board. By a regulation, 44 Fed. Reg. 30528, 43807 (1979), the Department transferred to the Education Appeal Board appeals pending before the Title I Audit Hearing Board when the Education Appeal Board was created. See 20 U. S. C. § 1234(f) (1976 ed., Supp. V).

[2] Section 182(a), as set forth in 20 U. S. C. § 2832(a) (1976 ed., Supp. V), provides in part:

> "The Secretary shall not approve an application . . . until he has made specific findings in writing . . . that he is satisfied that the assurances in such application and the assurances contained in its general application under section 435 of the General Education Provisions Act [20 U. S. C. 1232d] (where applicable) will be carried out."

Section 435(b), 20 U. S. C. § 1232d(b) (1976 ed., Supp. V), requires assurances "that each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications."

Section 182 was added in 1978, Pub. L. 95–561, 92 Stat. 2188, but a substantially similar provision was in effect from the date of the enactment of ESEA. See § 206, 79 Stat. 31.

August 1973, and Pennsylvania for the period July 1, 1967, through June 30, 1973, to ensure compliance with ESEA and the regulations promulgated under ESEA, federal auditors determined that each State had misapplied funds. After review requested by the States, the Education Appeal Board (Board) modified the findings of the auditors and assessed a deficiency of $1,031,304 against New Jersey and a deficiency of $422,424.29 against Pennsylvania. The Secretary declined to review the orders establishing the deficiencies, and, after a period for comment, the orders became final. See App. to Pet. for Cert. 57a, 86a–87a. Both States filed timely petitions for review in the United States Court of Appeals for the Third Circuit, which consolidated the cases and held that the Department did not have the authority to issue the orders. *New Jersey Dept. of Education* v. *Hufstedler*, 662 F. 2d 208 (1981). It therefore did not reach New Jersey's arguments that the State had not in fact misapplied the funds, *id.*, at 209, or Pennsylvania's arguments challenging the agency's rulemaking procedures and its application of ESEA's limitations provision, *ibid.*

II

The threshold question in this case, one that need not detain us long, is whether the court below had jurisdiction. Since federal courts are courts of limited jurisdiction, the court below could hear the case only if authorized by statute. It premised its exercise of jurisdiction alternatively on § 195 of ESEA, 20 U. S. C. § 2851 (1976 ed., Supp. V), and on § 455 of the General Education Provisions Act (GEPA), as amended, Pub. L. 95–561, 92 Stat. 2350, 20 U. S. C. § 1234d (1976 ed., Supp. V). The first provision permits judicial review in the courts of appeals of the Secretary's final action with respect to audits, and the second permits judicial review in the courts of appeals of actions of the Board.[3] Although only § 195 explicitly requires "final" action, we think that a final order is necessary under either section. The strong presumption is that judicial review will be available only when agency action becomes final, *FPC* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385 (1938); see generally 5 U. S. C. § 704 (1982 ed.); 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3942 (1977), and there is nothing in § 455 to overcome that presumption. Indeed, § 455 provides judicial review of decisions made under §§ 452, 453, and 454, 20 U. S. C. §§ 1234a, 1234b, 1234c (1976 ed., Supp. V), each of which includes a subsection dealing with finality and suggesting that only a "decision" of the Board is subject to review. See §§ 452(d), 453(d), 454(d), 20 U. S. C. §§ 1234a(d), 1234b(d), 1234c(d) (1976 ed., Supp. V). Consequently, we conclude that, at least in the absence of an appealable collateral order, *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n. 11 (1976); *Cohen* v. *Beneficial Industrial Loan Corp*, 337 U. S. 541, 545–547

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[3] Both provisions were originally enacted as part of the Education Amendments of 1978 (1978 Amendments), Pub. L. 95–561, §§ 195, 1232, 92

Stat. 2196–2197, 2350. We agree with the Court of Appeals that those provisions apply retroactively, though we pretermit the question whether the substantive provisions of the 1978 Amendments also apply retroactively, see *infra*, at 782. Under the pre-1978 version of ESEA, there was no explicit provision for judicial review of decisions of the Title I Audit Hearing Board. The presumption that review is available, see 5 U. S. C. §§ 701(a), 702, 704 (1982 ed.); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), coupled with the absence of any indication in the statute that the decision is committed wholly to the discretion of the agency or that review is otherwise precluded, see 5 U. S. C. § 701(a) (1982 ed.), leads to the conclusion that the district courts would have had jurisdiction under the general grant of jurisdiction over cases involving federal questions, 28 U. S. C. § 1331 (1976 ed., Supp. V). See generally 4 K. Davis, Administrative Law § 23:5, p. 135 (2d ed. 1983); C. Wright, Law of Federal Courts § 103 (3d ed. 1976). Once the Department transferred the cases of the Title I Audit Hearing Board to the Education Appeal Board, 44 Fed. Reg. 30528, 43807 (1979); see § 451, 20 U. S. C. § 1234(f) (1976 ed., Supp. V) (authorizing transfer), the effect of the 1978 Amendments was merely to change the forum for review. As Justice Holmes explained for the Court in *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916), a change of forum "takes away no substantive right" and thus can apply retroactively.

(1949), the federal courts may exercise jurisdiction only over a final order of the Department. We therefore must determine whether this case meets that requirement.

The Board's order, which became the agency's decision, merely established the amount of the deficiency owed by the States to the Federal Government, leaving for further "discussion" the method of repayment.[4] See App. to Pet. for Cert. 88a, 90a. The possibility of further proceedings in the agency to determine the method of repayment does not, in our view, render the orders less than "final." The situation here corresponds to the ordinary adjudication by a trial court that a plaintiff has a right to damages. Although the judgment in favor of the plaintiff is not self-executing and he may have to undertake further proceedings to collect the damages awarded, that possibility does not prevent appellate review of the decision, which is final. Our cases have interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process. See, *e. g.*, *FTC* v. *Standard Oil*

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[4] New Jersey seems to take the view that the Secretary has settled the method of collection by demanding repayment. See Brief for Respondent New Jersey 16, n. 10, 28, n. 15, 33–34. In fact, the record shows that each State received notice of the Board's decision, stating: "[The State] should refund [the amount] to the Department of Education. Appropriate authorities within the Department will be in touch with you at an early date to discuss the method of repayment of the funds in question." App. to Pet. for Cert. 88a, 90a.

New Jersey has reproduced as an appendix to its brief a letter demanding immediate repayment, App. to Brief for Respondent New Jersey 1a–2a, suggesting that the Secretary has already determined the manner of collection. That letter is not part of the record, and we are inclined, in any event, to view it as an initial proposal of a means of collection. Cf. 4 CFR § 102.2 (1983) (regulation under Federal Claims Collection Act, Pub. L. 89–508, § 3, 80 Stat. 309, 31 U. S. C. § 952, requiring agency to make written demand for repayment in attempting collection of claims). Moreover, the Secretary, who is the petitioner, has not asked us to decide what means of collection are available to him, but only whether he is a creditor. Since the case does not present the issue of available remedies, we do not address it.

Co., 449 U. S. 232, 239 (1980); *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 71 (1970). Review of the agency's decision at this time will not disrupt administrative proceedings any more than review of a trial court's award of damages interferes with its processes. Indeed, full review of the judgment may expedite the collection process, since the States know their ultimate liability with certainty. The agency's determination of the deficiency here represented a definitive statement of its position, determining the rights and obligations of the parties, see *Standard Oil Co., supra*, at 239 (explaining *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967)); *Port of Boston, supra*, at 71; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 205 (1960). Therefore, the Court of Appeals properly took jurisdiction of the case, and we too have jurisdiction to address the merits.

III

Turning to the merits, the States first challenge the Secretary's order by asserting that, even if the Board properly determined that they misused the funds, the Federal Government cannot recover the amount misused. Thus, we must decide whether, assuming that a State has misused funds granted to it under Title I of ESEA, it becomes liable to the Federal Government for those funds. The Education Amendments of 1978 (1978 Amendments), Pub. L. 95–561, 92 Stat. 2143, 20 U. S. C. § 2701 *et seq.* (1976 ed., Supp. V), rendered explicit the authority of the Secretary to recover funds misspent by a recipient. § 185(b), 92 Stat. 2190, 20 U. S. C. § 2835(b) (1976 ed., Supp. V). Although the final determination of the Board in each of these appeals occurred after the enactment of the 1978 Amendments, the audits reviewed periods before 1978. Both States take the position that, before the 1978 Amendments, the Secretary's sole remedy for noncompliance was prospective: he could withhold funds from a State that did not comply, until the State brought its program into compliance, § 146, 20 U. S. C. § 241j, or he could deny applications for funds for noncomplying programs, § 142, 20 U. S. C. § 241f.[5] Further, they contend that the 1978 Amendments operated prospectively only.[6] The Secretary has argued both that the 1978 Amendments had retroactive effect and that the right of recovery existed in the pre-1978 version of ESEA. Since we are persuaded that the pre-1978 version contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused, we need not address the possible retroactive effect of the 1978 Amendments.[7]

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[5] New Jersey explains now that it does not object to what it characterizes as a "setoff" by the Secretary but that the Secretary did not request that remedy in the Court of Appeals. Brief for Respondent New Jersey 16, n. 10. That is, if the Secretary properly determined that New Jersey misused funds, he could, in New Jersey's view, withhold part of the funds that the State would otherwise be entitled to receive under Title I of ESEA in future years, and the State would undertake a smaller Title I program in those years. New Jersey's proposal does not, however, amount to a "recovery" by the Federal Government. Ordinarily, a State would obtain a certain sum in Title I funds by giving its assurances that it would expend *that sum* for Title I programs. § 142(a)(1), 20 U. S. C. § 241f(a)(1). New Jersey, however, proposes that it receive a smaller amount of money than it would otherwise be eligible to receive and that it give assurances that it would use only that smaller amount for Title I programs. See Brief for Respondent New Jersey 16, n. 10, 28, n. 15, 34; Tr. of Oral Arg. 48. In other words, the Federal Government would pay itself back by cutting back on the Title I program at no cost to New Jersey. The Secretary does not view this form of "setoff" as satisfactory. *Id.*, at 13–14. Thus, despite New Jersey's assertion that there is no longer any dispute between it and the Secretary over the availability of some remedy, Brief for Respondent New Jersey 17, n. 10, a controversy remains.

[6] Pennsylvania has suggested that the Education Consolidation and Improvements Act of 1981 (ECIA) governs this case. Brief for Respondent Pennsylvania 44. It does not, however, seek the application of anything but the substantive standards introduced by that Act for determining compliance. On the contrary, it explicitly argues for the application of the procedures and remedies of the pre-1978 ESEA. *Id.*, at 42.

In any event, even if we misapprehend Pennsylvania's argument and it seeks full retroactivity of ECIA, our result would not differ, for the remedies of the ECIA clearly include a repayment remedy. See § 452(e), as added by Pub. L. 95–561, 92 Stat. 2348, 20 U. S. C. § 1234a(e) (1976 ed., Supp. V), made applicable to ECIA by § 400(b), 20 U. S. C. § 1221(b); see also 47 Fed. Reg. 52348 (1982) (to be codified in 34 CFR § 200.57(a)(2)) (requiring repayment of funds misused under ECIA). We decide here only whether the States can be held liable for the misuse of funds, and we leave for the Court of Appeals on remand the question whether the substantive standards of the ECIA or the 1978 Amendments can apply to grants approved and paid under the pre-1978 ESEA.

Section 207(a)(1) as added by ESEA, Pub. L. 89–10, 79 Stat. 32, originally provided:

> "The Commissioner shall, subject to the provisions of § 208 [dealing with inadequate appropriations], from time to time pay to each State, in advance or otherwise, the amount which the local educational agencies of that State are eligible to receive under this part. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it."

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[7] To the extent that the 1978 Amendments merely changed the forum for assertion of a pre-existing right, we have already decided that they do have retroactive effect. See n. 3, *supra*. The pre-existing right, of course, arises from the pre-1978 version of ESEA.

Relying on the pre-1978 version of ESEA also permits us to pretermit decision on the alternative argument offered by the Secretary—that the Government has a common-law right to recover funds any time the recipient of a grant fails to comply with the conditions of the grant. Compare 2 R. Cappalli, Federal Grants and Cooperative Agreements §§ 8:12, 8:15 (1982) (suggesting statutory or regulatory authorization necessary); Willcox, The Function and Nature of Grants, 22 Ad. L. Rev. 125, 131 (1969) (same), with *Mount Sinai Hospital* v. *Weinberger*, 517 F. 2d 329 (CA5 1975) (suggesting that authority exists in the absence of statutory provision to the contrary), cert. denied, 425 U. S. 935 (1976); *West Virginia* v. *Secretary of Education*, 667 F. 2d 417 (CA4 1981) *(per curiam)* (specific statutory authority unnecessary). Cf. *California* v. *Block*, 663 F. 2d 855 (CA9 1981) (regulation requiring repayment of misspent funds invalid where statute required repayment of funds misspent with "gross negligence"). See generally *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981); *United States* v. *Wurts*, 303 U. S. 414 (1938).

This provision, which remained substantially unchanged as part of Title I until 1970, in our view, gives the Federal Government a right to the amount of any funds overpaid. The plain language of the statute recognizes the right,[8] and the legislative history supports that natural reading. The Senate Report explained: "[S]ince the State is given no authority to retain excess sums paid to it under the title, any excess paid to a State would have to be returned or taken into account in making subsequent payments to the State." S. Rep. No. 146, 89th Cong, 1st Sess., 14 (1965). Indeed, the Committee obtained assurances from the Department that it would recapture these payments, and the debate on the floor termed those assurances "an essential condition for enacting the proposed legislation." 111 Cong. Rec. 7690 (1965).[9]

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[8] The only other remotely plausible reading is that suggested by New Jersey, see n. 5, *supra*—that the Secretary is to reduce grants below the amount that the State would otherwise be eligible to receive, and the State is to undertake a less extensive Title I program, so that the Federal Government recovers nothing: it pays less, but it receives correspondingly less in the way of Title I programs. Under that reading, the State would have no liability to the Federal Government for misspent funds.

That reading is no more than remotely plausible. First, it is hardly likely that Congress intended disadvantaged children to suffer twice: once when the State misspent the funds and once when the State cancels an otherwise eligible program because of the Secretary's refusal to fund it. Second, § 207 required the Secretary to use as his starting point the amount "the local educational agencies of that State are *eligible* to receive" and to adjust that amount for past misuses. But a State only becomes "eligible" by giving its assurances that it will expend the grant on Title I programs. See S. Rep. No. 146, 89th Cong., 1st Sess., 14 (1965); § 142(a)(1), 20 U. S. C. § 241f(a)(1). Section 207, then, must contemplate that the Federal Government will receive the same amount in Title I programs but will pay the State something less than that amount—a net recovery.

[9] The debates in the House also suggested such a concern and a desire to hold the States accountable in every way possible:

"It would seem . . . that *insofar as the Congress can accomplish this end,* rules of accountability, economy, and efficiency will be insisted upon, so that no Federal funds are improperly or wastefully used or diverted to uses not permitted by the act." 111 Cong. Rec. 6147 (1965) (emphasis added).

In 1970, Congress enacted GEPA, Pub. L. 91–230, 84 Stat. 164, the main function of which was to bring the general provisions of prior law together into a single title. See H. R. Conf. Rep. No. 91–937, p. 97 (1970). Its provisions apply to programs under Title I, 20 U. S. C. § 1221(b), and it was in force for some of the years at issue here. Section 415 of GEPA is substantially the same as the original § 207(a)(1) of Title I,[10] and its language likewise creates a right to impose liability on the States. In enacting GEPA, Congress again made clear its intention that States return misused funds. The Senate Committee explained: "Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer." S. Rep. No. 91–634, p. 84 (1970).[11]

Moreover, this interpretation of § 207(a)(1) and § 415 enjoys the support of later Congresses. Of course, the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.

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[10] Section 415 reads:

"Payments pursuant to grants or contracts under any applicable program may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine." 20 U. S. C. § 1226a–1 (1976 ed., Supp. V).

Section 415 was originally numbered § 425.

[11] The quoted language comes from the Senate Committee's discussion of "Sections 422, 423, and 425 [since renumbered as § 415]." The Court of Appeals concluded that the heading reflected a typographical error, and that the discussion referred to §§ 422, 423, and 424. See *New Jersey Dept. of Education* v. *Hufstedler*, 662 F. 2d 208, 214–215 (1981). It does seem likely that the intended reference was § 424, but we fail to see why that feature should, as New Jersey argues, render this language any less relevant. Section 424 required certain types of recordkeeping of recipients and gave the Secretary power to audit. Auditing the required records would reveal whether or not the Secretary had overpaid a recipient, and the Senate Committee clearly thought that overpayments would lead to a recovery, as provided by the former § 425.

See, *e. g.*, *Bowsher* v. *Merck & Co.*, 460 U. S. 824, 837–838, n. 12 (1983). The discussion of the 1978 Amendments to ESEA reveals that Congress thought that recipients were already liable for any funds they misused. Representative Corrada explained:

> "[T]itle I, ESEA . . . and [the] regulations currently provide for two main enforcement mechanisms at the Federal level: First the withholding of title I funds from a State or local educational agency when a violation is discovered; and second, the repayment of misspent funds after an audit . . . .
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> "[The] repayment authority following an audit has been used in the last couple of years on a number of occasions and has been an effective measure . . . . Approximately one-third of these cases have reached final resolution and have required repayment.
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> . . . . .
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> "The proposed amendments would . . . solve the problems with the *existing* audit repayment . . . authority." 124 Cong. Rec. 20612 (1978) (emphasis added).

Later, in 1981, Senator DeConcini introduced an amendment that would have prevented collection of any debts arising from misuse of Title I funds before 1978. 127 Cong. Rec. 10643 (1981). The chair ultimately ruled the amendment out of order, *id.*, at 10646, 10658, but the discussion preceding the ruling clearly reflects the view of the participants that States were liable for misused funds. As Senator Stennis observed: "It has to be paid back." *Id.*, at 10644; see *ibid.* (remarks of Sen. DeConcini). Not only have Members of Congress stated their views, but Congress has acted on those views.[12] In 1974, it enacted a provision limiting the liability of state and local educational agencies for refunds to those payments received by them within five years before the final written notice of liability. Pub. L. 93-380, § 106, 88 Stat. 512, 20 U. S. C. § 884.[13] Pennsylvania has argued that this provision has general applicability, and that Congress drafted it to cover other programs, which explicitly impose liability on recipients for misused funds. Brief for Respondent Pennsylvania 32. While the provision by its terms does apply to a number of programs administered by the Secretary, the State's argument fails, for both the statutory provision and the legislative history specifically refer to grants under Title I of ESEA, and the legislative history identifies the recent audits under Title I as the source of the Committee's concern. See H. R. Rep. No. 93-805, pp. 79, 156 (1974).

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[12] "Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean." *Mount Sinai Hospital* v. *Weinberger*, 517 F. 2d, at 343.

The Department has long held our view of the statute, for it often sought repayment of misused funds. See, *e. g.*, Department of Education, ESEA Audit Files 09-20033 (refund requested October 6, 1975, for fiscal years 1970 and 1971, and received May 25, 1978), 05-90178 (refund requested September 3. 1971, for period September 1, 1966–August 31, 1967, and received by October 26, 1971), 04-10001 (refund requested January 29, 1973, for period July 1, 1965–June 30, 1969, and received by April 27, 1973); H. R. Rep. No. 93-805, *supra*, at 79 (discussing recent audits); Washington Research Project of the Southern Center for Studies in Public Policy & NAACP Legal Defense and Educational Fund, Inc., Title I of ESEA: Is it Helping Poor Children? 52 (rev. 2d ed. 1969). Indeed, in the discussion of Senator DeConcini's proposed amendment, Senator Schmitt cited some 44 instances of repayments by recipients of misused Title I funds. 127 Cong. Rec. 10644-10645 (1981). Finally, it is worth noting that commentators on the pre-1978 version of ESEA assumed without discussion that the Department possessed the power to request refunds, although they frequently castigated the Department for its failure to exercise that power more often.[14]

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[13] This aspect of the provision was eliminated in the 1978 Amendments, by Pub. L. 95-561, § 901(b), 92 Stat. 2305.

The Senate version of the 1974 bill included a new remedy: specific performance. The bill provided that, as long as the recipient retained funds, the Secretary could seek specific performance of the grant "contract" in the federal courts. See S. 1539, 93d Cong., 2d Sess., § 434(c)(2) (1974). Although the Conference Committee eventually eliminated the provision, H. R. Conf. Rep. No. 93-1211, p. 184 (1974), the Senate approved the remedy because it gave the Secretary a means of inducing compliance without the interruption of Title I programs involved in applying the withholding remedy. S. Rep. No. 93-763, pp. 63, 211 (1974). The Senate's version addresses a different question than does § 415. The concern addressed by the proposed § 434(c)(2) was that beneficiaries not lose services in the future because of the failure of the recipient of the grant to live up to its duties. Once the beneficiaries have *already* lost the services because of past misuse of funds, as opposed to current noncompliance, the Senate Committee's discussion of remedies is no longer applicable. Particularly in the light of the contemporaneous enactment of § 884, we view the Senate's version of the 1974 bill as complementing, rather than undermining, our construction of § 415.

Arguing against this consistent understanding of the pre-1978 ESEA, the States attempt to explain §415 as a provision covering payments made "accidentally." Tr. of Oral Arg. 36. Even accepting that interpretation, we remain convinced that the provision covers payments misused as the Board determined these to have been. Grants of misused funds result from the "accident" of the Secretary's reliance on assurances by the State that the recipient will use the funds in a program that complies with Title I, when in fact the recipient misuses the funds.[15]

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[14] Washington Research Project of the Southern Center for Studies in Public Policy & NAACP Legal Defense and Educational Fund, Inc., Title I of ESEA: Is it Helping Poor Children? 52 (rev. 2d ed. 1969); Comment, Federal Aid to Education: Title I at the Operational Level, 1971 Law & Soc. Order 324, 350; see Berke & Kirst, The Federal Role in American School Finance: A Fiscal and Administrative Analysis, 61 Geo. L. J. 927, 944, and n. 71 (1973); Murphy, Title I of ESEA: The Politics of Implementing Federal Education Reform, 41 Harv. Educ. Rev. 35, 44-45 (1971).

[15] Pennsylvania also suggests that "overpayment" means only funds that are not expended but remain in the State's treasury. Brief for Respond-

A more substantial argument against our interpretation of § 415 is suggested by the opinion of the Court of Appeals.[16] The 1978 Amendments make it crystal clear that, at least for any period governed by the Amendments, the recipient will be liable for misused funds. The Amendments included § 185(b), which provides:

> "The Secretary shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits . . . . Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability of which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years." 20 U. S. C. § 2835(b) (1976 ed., Supp. V).

The Court of Appeals feared that interpreting the pre-1978 version of ESEA as providing liability for misused funds rendered § 185 "plain[ly] redundan[t]." 662 F. 2d, at 215. We share the reluctance of the Court of Appeals to construe a

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ent Pennsylvania 31. We see no indication of such a limitation in the statutory language or in the legislative history, and, indeed, we would find it difficult to believe that Congress meant to permit States to obtain good title to funds otherwise owing to the Federal Government by the simple expedient of spending them.

[16] The Court of Appeals relied on the argument in deciding that § 424 of GEPA, now renumbered as § 437, did not recognize the liability of the States to refund misused funds. The argument applies equally to § 415.

statute in a fashion that leaves some provisions superfluous, but we cannot agree that our construction presents that problem. Section 185 and the accompanying provisions of the 1978 Amendments were, in the words of the Senate Report, designed to "*clarif[y]* HEW's legal authority and responsibility to audit applicant programs" and to "specif[y] certain minimum standards concerning the resolution of outstanding audits." S. Rep. No. 95-856, p. 137 (1978) (emphasis added); see H. R. Rep. No. 95-1137, p. 53 (describing the Amendments as requiring that the Secretary "regularize" the process). As the House Report explained: "[N]othing in these new provisions should be interpreted as radically changing the present relationship of the Federal government to the States . . . . These amendments, rather, are meant merely to lay out responsibilities more clearly. . . ." *Id.*, at 142. Section 185 itself requires the Secretary to set timetables for each step of the audit resolution process, and it requires an appeals process. Further, the provision requires that the Secretary demand repayment once liability is established, rather than leaving the method of collection entirely to his discretion from the beginning. And it limits the Secretary's discretion with regard to installment payments, imposing a maximum period of three years. Construing the pre-1978 ESEA to provide for liability, then, does not leave § 185 meaningless. On the contrary, § 185 plays an important role in specifying the procedures to be followed in the determination of the amount of the debt and in the collection of the debt. Thus, the enactment of the 1978 Amendments does not undermine our construction. Indeed, the legislative history of the 1978 Amendments strongly supports viewing the pre-1978 ESEA as we do. As we have discussed, *supra*, at 785, the debates in the House proceeded on the assumption that the liability existed. The House Report also identified as one of the problems with existing law the failure of the agency in many cases to seek restitution and to recover the funds misused. H. R. Rep. No. 95-1137, *supra*, at 50. In sum, not only does our conclusion give meaning to the efforts of the 95th Congress, it also gives meaning to their understanding of the law that they were amending. Accordingly, we adhere to our view that the pre-1978 version of ESEA requires that recipients be held liable for funds that they misuse.[17]

IV

New Jersey, relying on our decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), also urges that the imposition of liability for misused funds interferes with state sovereignty, in violation of the Tenth Amendment. It views our construction of the statute as presenting it with "unpalatable" alternatives: making a special appropriation to repay the misused funds, or cutting back its budget for education by the amount owed to the Federal Government. Brief for Respondent New Jersey 28–29. Either alternative, it asserts, infringes its sovereignty.

We cannot agree. Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I. See generally *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981); *Quern* v.

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[17] The States have also argued that *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), requires a different view of the effect of the pre-1978 version of the statute. *Pennhurst* required that Congress act "unambiguously" when it intends to impose a condition on the grant of federal money. *Id.*, at 17. The States argue that Congress did not speak unambiguously before 1978 in imposing liability and it therefore was not effective in imposing liability. We disagree. As our discussion shows, we think that the plain language of the statute is sufficiently clear, and ESEA meets *Pennhurst*'s requirement of legislative clarity. Moreover, *Pennhurst* arose in the context of imposing an unexpected condition for compliance—a new obligation for participating States—while here our concern is with the remedies available against a noncomplying State.

Mandley, 436 U. S. 725, 734 (1978); *Rosado* v. *Wyman*, 397 U. S. 397, 408 (1970); *Oklahoma* v. *CSC*, 330 U. S. 127, 143–144 (1947); 1 R. Cappalli, Federal Grants and Cooperative Agreements § 1:09 (1982). As we must assume at this stage of the litigation, the State failed to fulfill those assurances, and it therefore became liable for the funds misused, as the grant specified. New Jersey has not challenged the program itself as intruding unduly on its sovereignty, see Brief for Respondent New Jersey 19–20, but challenges only the requirement that it account for funds that it accepted under admittedly valid conditions with which it failed to comply. If the conditions were valid, the State had no sovereign right to retain funds without complying with those conditions.

V

Once we have established the right of the Federal Government to recover funds misused by the States, we are confronted with the question how, under the statutory scheme, the Federal Government must assert its rights. Again, we agree with the Secretary's view that the initial determination is to be made administratively. The statute clearly assigned to the agency the duty of auditing grant recipients, see GEPA, § 437, 20 U. S. C. § 1232f, and it is in the auditing process that the misuse of funds, and its magnitude, will surface. Further, the provision that supports the Secretary's right to recover funds, § 415 of GEPA, 20 U. S. C. § 1226a–1 (1976 ed., Supp. V), refers to adjustments to be made for overpayments "as the Secretary may determine." Consequently, we conclude that the determination of the existence and amount of the liability is committed to the agency, in the first instance.

The States, of course, had an opportunity to present their view of the facts and any justifications for their expenditures to the agency. After the initial determination by the auditors, the Department provided the States an opportunity for review before the Board, see App. 137–138, 144–145, 158–

165, and, once that body rendered its decision, the Department invited the States to submit comments before the Board's decision became the final decision of the Secretary, App. to Pet. for Cert. 57a, 86a–87a. Also, the agency's decision is subject to judicial review. The 1978 Amendments explicitly provide for review in the courts of appeals. Even without an explicit provision for judicial review, review was also available under the pre-1978 version of ESEA, for in the absence of strong indications that a statute commits a decision irrevocably to agency discretion, 5 U. S. C. §§ 701(a), 702, 704 (1982 ed.); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), the propriety of the agency's action presents a federal question cognizable in the district courts, see n. 3, *supra*. Review of the Education Appeal Board lies in the courts of appeals, ESEA § 195, 20 U. S. C. § 2851 (1976 ed., Supp. V); GEPA § 455, 20 U. S. C. § 1234d (1976 ed., Supp. V), so, in cases like the present ones, which began before the Title I Audit Board and which were transferred to the Education Appeal Board, judicial review is available in the courts of appeals. See *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916) (change of forum can be applied retroactively); n. 3, *supra*. Thus, the States have an opportunity to litigate in the courts of appeals whether the findings of the Secretary are supported by substantial evidence and reflect application of the proper legal standards. § 455(c), 20 U. S. C. § 1234d(c) (1976 ed., Supp. V); 5 U. S. C. § 706 (1982 ed.).

VI

In this case, then, we conclude that the Secretary has followed the proper procedures. He has administratively determined the amount of the debt owed by each State to the Federal Government, see n. 4, *supra*, as he is empowered to do. Whether that determination is supported by substantial evidence and by the application of the proper legal standards is a question for the courts, if the affected parties seek judicial review. Here, New Jersey and Pennsylvania sought that review, and we remand to the Court of Appeals to permit it to undertake to review the challenges raised by each State to the Secretary's determination. Accordingly, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

The Court holds that the "plain language" of § 207(a)(1) of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 32, and its successor provision, § 415 of the General Education Provisions Act, 20 U. S. C. § 1226a-1 (1976 ed., Supp. V), expressly grants the Secretary of Education (1) the right to require States to repay misspent Title I funds, and (2) the right to make an administrative adjudication of the question whether funds have in fact been misspent, with the result that such adjudication is subject to judicial review only on a limited, "substantial evidence" basis. *Ante*, at 782-792. The Secretary will no doubt be pleased with today's holding, but I note that he must have thought the authorizing language of this provision was not so "plain," since his lawyers deemed it worthy of no more than passing mention in his brief. See Brief for Petitioner 7, 20.

I join the Court's opinion, although I would have preferred to decide the case on a different basis, one that has been thoroughly briefed. Specifically, I would have held that the 1978 Amendments, see 20 U. S. C. §§ 1234, 2835(b) (1976 ed., Supp. V), which unequivocally state that the Secretary may administratively recoup misspent Title I funds, should be applied retroactively. A federal court or administrative agency must "apply the law in effect at the the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U. S. 696, 711 (1974). Accord, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 486, n. 16 (1981). Here, nothing in the 1978 Amendments or the legislative history suggests that the Amendments were not intended to be applied retroactively, and their application to this case would not result in manifest injustice. The States entered into contractual-type agreements with the United States to disburse the moneys in accordance with specified conditions. The States had no legitimate claim to a right to be able to breach these agreements with impunity. In the absence of any contrary congressional intent, agreements such as these are surely enforceable in a court of law. Therefore, at most, the 1978 Amendments merely changed the appropriate forum for litigating the Federal Government's claims that the agreements had been breached from a court of competent jurisdiction to an administrative tribunal. Because there is no manifest injustice in a simple change of forum, see *ante*, at 777–778, n. 3; *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916), there is no bar to the retroactive application of the 1978 Amendments, and this case more preferably should have been decided on this basis.

In closing, I also note that this case does *not* involve any question as to the substantive standard by which a claim that a recipient has violated its Title I commitments is to be judged. Rather, it concerns the abstract question whether the Secretary has the right to recover Title I funds under any circumstances. In my view, there is a significant issue whether a State can be required to repay if it has committed no more than a technical violation of the agreement or if the claim of violation rests on a new regulation or construction of the statute issued after the State entered the program and had its plan approved.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 794 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 25 THROUGH JUNE 3, 1983

April 25, 1983

Appeal Dismissed

No. 82–6444. Ray *v.* Department of the Navy et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

*Miscellaneous Orders**

No. — – ——. Sampson *v.* Committee on Probation. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. — – ——. Boland & Cornelius, Inc., et al. *v.* Chesapeake & Ohio Railway Co. et al. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–843. Marcello et al. *v.* United States. Application to recall and stay the mandate of the United States Court of Appeals for the Fifth Circuit, addressed to Justice Brennan and referred to the Court, denied.

No. D–288. In re Disbarment of Lieberman. Disbarment entered. [For earlier order herein, see 458 U. S. 1127.]

No. D–296. In re Disbarment of Coleman. Disbarment entered. [For earlier order herein, see 459 U. S. 939.]

No. D–301. In re Disbarment of Bonnin. Disbarment entered. [For earlier order herein, see 459 U. S. 985.]

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*For the Court's order prescribing Bankruptcy Rules, see *post*, p. 975.

No. D-308. In re Disbarment of Odendahl. Disbarment entered. [For earlier order herein, see 459 U. S. 1140.]

No. D-313. In re Disbarment of Grimes. Disbarment entered. [For earlier order herein, see 459 U. S. 1141.]

No. D-322. In re Disbarment of Minn. Howard W. Minn, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 28, 1983 [460 U. S. 1009], is hereby discharged.

No. D-333. In re Disbarment of Baxter. It is ordered that Herbert Russell Baxter, of Mentor, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-334. In re Disbarment of Aglow. It is ordered that Lawrence M. Aglow, of West Chester, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-335. In re Disbarment of Huber. It is ordered that Donald G. Huber, of Okemos, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-336. In re Disbarment of McLean. It is ordered that Lee Marshall McLean, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-337. IN RE DISBARMENT OF VANDOREN. It is ordered that Edward B. Vandoren, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81-1889. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* MID-LOUISIANA GAS CO. ET AL.;
No. 81-1958. ARIZONA ELECTRIC POWER COOPERATIVE, INC. *v.* MID-LOUISIANA GAS CO. ET AL.;
No. 81-2042. MICHIGAN *v.* MID-LOUISIANA GAS CO. ET AL.; and
No. 82-19. FEDERAL ENERGY REGULATORY COMMISSION *v.* MID-LOUISIANA GAS CO. ET AL. C. A. 5th Cir. [Certiorari granted, 459 U. S. 820.] Motion of respondents for leave to file reply to supplemental memorandum filed after argument granted.

No. 81-2147. ARIZONA ET AL. *v.* SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.; ARIZONA ET AL. *v.* NAVAJO TRIBE OF INDIANS ET AL.; and
No. 81-2188. MONTANA ET AL. *v.* NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 821.] Motion of petitioners in No. 81-2188 for leave to file a response to the memorandum of the United States filed after argument granted. Motion of respondent Navajo Nation in No. 81-2147 for leave to file a brief after argument granted.

No. 82-599. COMMISSIONER OF INTERNAL REVENUE *v.* ENGLE ET UX. C. A. 7th Cir.; and
No. 82-774. FARMAR ET AL. *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 459 U. S. 1102.] Motion of

respondents in No. 82–599 and petitioners in No. 82–774 for divided argument granted.

No. 82–6489. IN RE SHABAZZ. C. A. 9th Cir. Petition for writ of common-law certiorari denied.

Certiorari Granted

No. 82–629. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P.C., ET AL. Sup. Ct. N. D. Certiorari granted. Reported below: 321 N. W. 2d 510.

No. 82–1246. BOSE CORP. *v.* CONSUMERS UNION OF UNITED STATES, INC. C. A. 1st Cir. Certiorari granted. Reported below: 692 F. 2d 189.

No. 82–1271. IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* DELGADO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 681 F. 2d 624.

No. 82–1367. ROADWAY EXPRESS, INC. *v.* WARREN. Ct. App. Ga. Certiorari granted. Reported below: 163 Ga. App. 759, 295 S. E. 2d 743.

No. 82–1371. SECRETARY OF HEALTH AND HUMAN SERVICES *v.* DAY ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* denied. Certiorari granted. Reported below: 685 F. 2d 19.

No. 82–1432. PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPER, VIRGINIA *v.* ALLEN ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 690 F. 2d 376.

Certiorari Denied. (See also Nos. 82–6444 and 82–6489, *supra.*)

No. 82–1060. GOUVEIA *v.* NAPILI-KAI, LTD., DBA NAPILI KAI BEACH CLUB. Sup. Ct. Haw. Certiorari denied. Reported below: 65 Haw. 189, 649 P. 2d 1119.

No. 82-1089. CITY OF MARIETTA, GEORGIA, ET AL. *v.* DILLS, DBA MID-GEORGIA SUPPLY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 674 F. 2d 1377.

No. 82-1128. PAVKOVIC, DIRECTOR, ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES *v.* TIDWELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 560.

No. 82-1219. SQUIRES *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 689 F. 2d 1276.

No. 82-1262. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82-1264. LOUISIANA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 82-1272. UNITED GAS PIPE LINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 224 U. S. App. D. C. 162 and 212, 694 F. 2d 728 and 778.

No. 82-1275. TERRY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 108 Ill. App. 3d 1222, 446 N. E. 2d 324.

No. 82-1280. SPAWR OPTICAL RESEARCH, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 1076.

No. 82-1286. BORDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 1318.

No. 82-1310. HUMPHRIES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 82-1417. WALKER DIE CASTING, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 682 F. 2d 592.

No. 82-1439. BORKOWSKI *v.* BORKOWSKI. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 108 Ill. App. 3d 1204, 446 N. E. 2d 314.

No. 82–1456. AMERICAN GERI-CARE INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 56.

No. 82–1462. HERBST *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 109 Wis. 2d 692, 326 N. W. 2d 782.

No. 82–1469. LOCASCIO ET AL. *v.* TELETYPE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 694 F. 2d 497.

No. 82–1470. POWERS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 440 N. E. 2d 1096.

No. 82–1478. WALSH ET AL. *v.* PRINCE GEORGE DEPARTMENT OF SOCIAL SERVICES. Sup. Ct. Va. Certiorari denied.

No. 82–1480. KLINE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 422 So. 2d 1164.

No. 82–1483. ANDRE *v.* MERRILL LYNCH READY ASSETS TRUST ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 923.

No. 82–1484. CORDIS CORP. *v.* CARDIAC PACEMAKERS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 690 F. 2d 665.

No. 82–1487. HERZOG, RECEIVER OF D. H. OVERMYER CO., INC. (OHIO), ET AL. *v.* FIRST NATIONAL BANK OF BOSTON. C. A. 1st Cir. Certiorari denied. Reported below: 698 F. 2d 1214.

No. 82–1514. MILLER *v.* UNITED STATES; and

No. 82–6451. WALTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: No. 82–1514, 708 F. 2d 729; No. 82–6451, 708 F. 2d 730.

No. 82–1529. WINDWARD PARTNERS ET AL. *v.* ARIYOSHI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 928.

No. 82-1569. MARINO *v.* UNITED STATES; and

No. 82-6390. PROVOST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 898.

No. 82-1570. ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1307.

No. 82-1580. DEMICHAEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 1059.

No. 82-1587. CHRISTIAN *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 82-1589. CARPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82-1596. GAULTNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 725.

No. 82-5911. SNYDER ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 447 A. 2d 776.

No. 82-6030. STUBBS *v.* BORDENKIRCHER, WARDEN, WEST VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 689 F. 2d 1205.

No. 82-6180. MCPHEETERS *v.* SPALDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 723.

No. 82-6304. SMITH *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 678 F. 2d 52.

No. 82-6313. REDDING *v.* COUNTY COURT, ORANGE COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 725.

No. 82-6314. THOMPSON *v.* WOODS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 82-6318. PITTSER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6324. CYNTJE *v.* GOVERNMENT OF THE VIRGIN ISLANDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1389.

No. 82-6328. KINSLOW ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 134.

No. 82-6330. BRADEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82-6331. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 28.

No. 82-6333. BREWER *v.* WEGMANN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 216.

No. 82-6336. PERRY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 278 S. C. 490, 299 S. E. 2d 324.

No. 82-6338. AARON *v.* VILLALOBOS. C. A. 9th Cir. Certiorari denied.

No. 82-6343. SMITH *v.* BORDENKIRCHER, WARDEN, WEST VIRGINIA STATE PENITENTIARY. Sup. Ct. App. W. Va. Certiorari denied.

No. 82-6345. BYRD *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 988.

No. 82-6347. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1396.

No. 82-6348. BROWN *v.* ST. LOUIS POLICE DEPARTMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 393.

No. 82-6351. DONALDSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 642 S. W. 2d 816.

No. 82-6358. SWEEZY *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 331.

No. 82-6359. RING *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 654 P. 2d 1085.

No. 82-6368. ROSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 425 So. 2d 521.

No. 82-6381. MOSES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 695 F. 2d 765.

No. 82-6394. ARNOLD *v.* DUVAL COUNTY SCHOOL BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 1051.

No. 82-6438. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 82-6441. BARRETT *v.* UNITED STATES; and
No. 82-6470. MOBLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 699 F. 2d 172.

No. 82-6447. EDWARDS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1277.

No. 82-6453. NANEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 405.

No. 82-6456. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82-6459. GUTIERREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 696 F. 2d 753.

No. 82-6463. SEIDERS *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied.

No. 82-6464. WUJS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1397.

No. 82-6465. WUJS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82-6467. GUTIERREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 696 F. 2d 753.

No. 82-6471. POKORNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 730.

No. 82-6475. NORTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 700 F. 2d 1072.

No. 82-6480. YEARY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82-6482. METCALFE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 877.

No. 82-6484. BENNETT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 728.

No. 82-6486. CATANIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 186.

No. 82-6488. LUMPKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 571.

No. 82-1438. WRIGHT *v.* INTERNATIONAL BUSINESS MACHINES CORP., INC. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 692 F. 2d 767.

No. 82-6172. GRAY *v.* LUCAS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 677 F. 2d 1086 and 685 F. 2d 139.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 81–1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC., 460 U. S. 103;

No. 82–974. THOMASSEN ET AL. *v.* UNITED STATES ET AL., 460 U. S. 1022;

No. 82–1077. KEYSTONE CABLE-VISION CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.,, 459 U. S. 1208;

No. 82–1152. HOGGARD *v.* ARKANSAS, 460 U. S. 1022; and

No. 82–5900. SMITH *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, 459 U. S. 1215. Petitions for rehearing denied.

APRIL 27, 1983

Dismissal Under Rule 53

No. 82–5276. SIMMONS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 676 F. 2d 925.

APRIL 28, 1983

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. 1097, and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1119.)

MAY 2, 1983

Affirmed on Appeal

No. 82–1141. COMMON CAUSE ET AL. *v.* BOLGER, POSTMASTER GENERAL, ET AL. Affirmed on appeal from D. C. D. C. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 574 F. Supp. 672.

No. 82-1555. PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. *v.* CONSOLIDATED RAIL CORPORATION. Affirmed on appeal from C. A. 3d Cir. Reported below: 696 F. 2d 981.

Appeals Dismissed

No. 82-540. MISSISSIPPI *v.* SMITH, ATTORNEY GENERAL. Appeal from D. C. D. C. dismissed for want of jurisdiction. Reported below: 541 F. Supp. 1329.

No. 82-1513. ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC. *v.* FLORIDA PUBLIC SERVICE COMMISSION ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 421 So. 2d 1384.

No. 82-6419. LACHER *v.* CITY OF BEMIDJI. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 81-1063. UNITED STATES ET AL. *v.* MEEKS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Rylander*, 460 U. S. 752 (1983). Reported below: 642 F. 2d 733.

Miscellaneous Orders

No. — — ——. IN RE STERN. Application for reinstatement as a member of the Bar of this Court denied.

No. 80-1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80-1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL., 459 U. S. 1194. Motion of respondents to retax costs denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant this motion.

No. 82-6354. IN RE BROADWAY. Petition for writ of mandamus denied.

No. 81–2245. NEVADA *v.* UNITED STATES ET AL.;

No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 904.] Motion of Pyramid Lake Paiute Tribe of Indians for leave to file a reply brief out of time granted.

Certiorari Granted. (See also No. 82-132, *ante*, at 280.)

No. 82–786. UNITED STATES *v.* DOE. C. A. 3d Cir. Certiorari granted. Reported below: 680 F. 2d 327.

Certiorari Denied. (See also No. 82–1513, *supra*.)

No. 81–1357. GREGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 657 F. 2d 1109.

No. 81–2082. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* SMITHKLINE CORP.; and

No. 81–2268. SMITHKLINE CORP. *v.* BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 668 F. 2d 201.

No. 82–648. HARTIGAN, ATTORNEY GENERAL OF ILLINOIS, ET AL. *v.* GENERAL ELECTRIC CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 683 F. 2d 206.

No. 82–841. DON'T WASTE WASHINGTON LEGAL DEFENSE FOUNDATION *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 684 F. 2d 627.

No. 82–1126. MARGIOTTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 108.

No. 82–1160. ARUTUNOFF ET AL. *v.* OKLAHOMA STATE ELECTION BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 687 F. 2d 1375.

No. 82–1241. PINCKARD ET AL. *v.* PINCKARD. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 82-1257. RANDALL DIVISION OF TEXTRON, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 1240.

No. 82-1263. KENDRICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 1262.

No. 82-1304. MONTGOMERY WARD & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 1115.

No. 82-1320. FIDELITY SAVINGS & LOAN ASSN. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 689 F. 2d 803.

No. 82-1334. CEDAR POINT INVESTMENT CORP. ET AL. *v.* CEDAR POINT APARTMENTS, LTD., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 748.

No. 82-1338. HUNTER ET AL. *v.* MAXIE. Sup. Ct. Alaska. Certiorari denied. Reported below: 651 P. 2d 1170.

No. 82-1410. MILLIKEN RESEARCH CORP. ET AL. *v.* BURLINGTON INDUSTRIES, INC., ET AL.; and

No. 82-1421. MILLIKEN & CO. *v.* BURLINGTON INDUSTRIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 690 F. 2d 380.

No. 82-1451. PRESTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 725.

No. 82-1488. NEWTON *v.* FEDERAL BARGE LINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 760.

No. 82-1492. HERITAGE PRODUCTS, INC., ET AL. *v.* ED-LEE, INC., ET AL. Ct. App. Ky. Certiorari denied.

No. 82-1495. KING *v.* MONTGOMERY COUNTY, MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 295 Md. 165, 453 A. 2d 828.

No. 82-1498. REICH *v.* LARSON, COUNTY CLERK OF THE COUNTY OF FRESNO, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 1147.

No. 82-1500. COLOKATHIS *v.* WENTWORTH-DOUGLASS HOSPITAL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 693 F. 2d 7.

No. 82-1502. CRUMPLER *v.* MISSISSIPPI STATE HIGHWAY COMMISSION. Sup. Ct. Miss. Certiorari denied. Reported below: 421 So. 2d 1233.

No. 82-1518. LEWIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 440 N. E. 2d 1125.

No. 82-1519. ANDREWS *v.* LAWSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 716.

No. 82-1522. TYLER *v.* HARTFORD FIRE INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 82-1534. NEUFELD *v.* BAMBROUGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 823.

No. 82-1537. VINCE *v.* DEJOHN. Ct. App. La., 1st Cir. Certiorari denied.

No. 82-1544. FIRST COLONIAL CORPORATION OF AMERICA *v.* AMERICAN BENEFIT LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 447.

No. 82-1546. BUTLER *v.* PEABODY INSTITUTE OF THE CITY OF BALTIMORE. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 766.

No. 82-1560. DIROSE *v.* PK MANAGEMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 691 F. 2d 628.

No. 82-1563. HALLEY *v.* CONSOLIDATED RAIL CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 113.

No. 82-1625. BOUMA ET UX. *v.* LARRY C. IVERSON, INC. Sup. Ct. Mont. Certiorari denied.

No. 82-5974. HUDSON *v.* RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 826.

No. 82-6068. BOYD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 82-6111. SCRUGGS *v.* JOHNSON, WARDEN, POWHATAN CORRECTIONAL CENTER (two cases). Sup. Ct. Va. Certiorari denied.

No. 82-6114. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82-6120. EVANKO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82-6165. NORWOOD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1087.

No. 82-6205. RICHARDS ET AL. *v.* SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 760.

No. 82-6291. MILLER *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 148.

No. 82-6305. MERRITT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 695 F. 2d 1263.

No. 82-6334. HALL *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 724.

No. 82-6335. HASLIP ET AL. *v.* STATE PUBLIC DEFENDER COMMISSION ET AL. Sup. Ct. Mo. Certiorari denied.

No. 82-6360. WILLIAMS *v.* SOWDERS. C. A. 6th Cir. Certiorari denied. Reported below: 696 F. 2d 464.

No. 82–6361. CLEVELAND *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 988.

No. 82–6363. THOMPSON *v.* MEDICAL OFFICER AT HAMILTON COUNTY JAIL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 82–6365. LACY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 697 F. 2d 271.

No. 82–6366. DAVIS *v.* DAVIS. Ct. App. N. Y. Certiorari denied.

No. 82–6367. MCADOO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 82–6371. VIENS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 1017, 441 N. E. 2d 660.

No. 82–6373. SMITH *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 728.

No. 82–6378. HOLLOWAY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 416 Mich. 288, 330 N. W. 2d 405.

No. 82–6379. JACKSON *v.* FIELDS, ACTING WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–6383. MINOR *v.* RUSHEN ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–6384. SAWVELL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–6386. MARTIN *v.* BARNES, JUDGE, CIRCUIT COURT OF COOPER COUNTY, BOONEVILLE, MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–6387. WILLIAMS *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 119.

No. 82–6388. COTNER *v.* GARDNER ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–6389. BOWLING *v.* STRICKLAND ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 769.

No. 82–6391. SMITH *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 728.

No. 82–6401. VALLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 697 F. 2d 152.

No. 82–6409. COTNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–6414. MELKONIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–1118. NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND ET AL. *v.* DUCHOW, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF DUCHOW. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 691 F. 2d 74.

No. 82–1130. SIVIGLIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari and summarily reverse the judgment of the United States Court of Appeals for the Tenth Circuit. Reported below: 686 F. 2d 832.

No. 82–1491. BRILEY *v.* DIRECTOR OF THE DEPARTMENT OF CORRECTIONS. Sup. Ct. Va.; and

No. 82–6412. FELDE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 82–6412, 422 So. 2d 370.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 82–1512. AAA LIQUORS, INC., ET AL. *v.* JOSEPH E. SEAGRAM & SONS, INC., DBA CALVERT DISTILLERS CO. ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 705 F. 2d 1203.

No. 82–1523. KELLER *v.* MCDANIEL ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 82–6106. KING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 421 So. 2d 1009.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would grant certiorari and vacate petitioner's death sentence on this basis alone. However, even under the prevailing view that the death penalty may constitutionally be imposed under certain conditions, I would grant certiorari to decide the constitutionality of instructing a jury that it *must* sentence the defendant to death if it finds that the prosecution has proved aggravating circumstances that outweigh any mitigating circumstances. There is a substantial question whether such an instruction impermissibly prevents the jury from basing its sentence on "factors which may call for a less severe penalty," *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion), even though they do not outweigh the aggravating circumstances proved by the prosecution. Cf. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976).

Rehearing Denied

No. 82-6060. IN RE GREEN, 460 U. S. 1036;

No. 82-6084. THRASHER *v.* MISSOURI STATE HIGHWAY COMMISSION ET AL., 460 U. S. 1043; and

No. 82-6144. UDELL *v.* UNIVERSITY OF LOWELL ET AL., 460 U. S. 1054. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit on May 11, 1983, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MAY 12, 1983

Dismissal Under Rule 53

No. 82-1506. MARKEY ET AL. *v.* COSTA. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 694 F. 2d 876.

MAY 13, 1983

Dismissal Under Rule 53

No. 82-1650. SERAVALLI ET AL. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari dismissed under this Court's Rule 53. Reported below: 189 Conn. 201, 455 A. 2d 852.

MAY 16, 1983

Appeals Dismissed

No. 82–1436. CITY OF TORRANCE *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. Motion of California Workers' Compensation Institute for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 32 Cal. 3d 371, 650 P. 2d 1162.

No. 82–1558. GAGNON ET AL. *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 387 Mass. 768, 443 N. E. 2d 407.

Vacated and Remanded on Appeal

No. 82–233. BROOKS ET AL. *v.* WINTER, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 82–413. WINTER, GOVERNOR OF MISSISSIPPI, ET AL. *v.* BROOKS ET AL. Appeals from D. C. N. D. Miss. The judgment and order are vacated and the cases are remanded for further consideration in light of § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, as amended in 1982. Reported below: 541 F. Supp. 1135.

Miscellaneous Orders

No. — – ——. MULLEN *v.* UNITED STATES. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–824. BOYD *v.* UNITED STATES. C. A. 9th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–869. BILLUPS *v.* UNITED STATES. C. A. 4th Cir. Application for stay and/or bond, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A–882. HOLLANDER, ADMINISTRATRIX OF THE ESTATE OF HOLLANDER *v.* UNIVERSITY OF ROCHESTER ET AL. Ct. App. N. Y. Application for leave to dispense with printing the petition for writ of certiorari, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–310. IN RE DISBARMENT OF TILYOU. Disbarment entered. [For earlier order herein, see 459 U. S. 1141.]

No. D–314. IN RE DISBARMENT OF MOLOVINSKY. Disbarment entered. [For earlier order herein, see 460 U. S. 1008.]

No. D–325. IN RE DISBARMENT OF HAMPARES. Disbarment entered. [For earlier order herein, see 460 U. S. 1019.]

No. D–326. IN RE DISBARMENT OF GALLOWAY. Disbarment entered. [For earlier order herein, see 460 U. S. 1019.]

No. D–329. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 460 U. S. 1020.]

No. D–338. IN RE DISBARMENT OF COLLINS. It is ordered that John Sellers Collins, of Glen Burnie, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–339. IN RE DISBARMENT OF LEIBOWITZ. It is ordered that Carl Leibowitz, of South Bend, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–340. IN RE DISBARMENT OF LONG. It is ordered that John D. Long III, of Union, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81-2159. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD *v.* KERR-McGEE CORP. ET AL. C. A. 10th Cir. [Probable jurisdiction postponed, 459 U. S. 1101.] Motions of National Women's Health Network and New Jersey Department of Public Advocate for leave to file briefs as *amici curiae* granted.

No. 81-2245. NEVADA *v.* UNITED STATES ET AL.;

No. 81-2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 82-38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 904.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 81-2332. NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. C. A. 4th Cir. [Certiorari granted, 459 U. S. 1145.] Motion of Mountain State Telephone & Telegraph Co. et al. for leave to file a brief as *amici curiae* granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 82-485. KEETON *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 459 U. S. 1169.] Motion of respondents for divided argument and for additional time for oral argument denied.

No. 82-556. PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. Ct. App. Cal., 4th App. Dist. [Certiorari granted, 459 U. S. 1169.] Motion of respondent for divided argument and for additional time for oral argument denied.

No. 82-799. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 1145.] Motion of respondent National Treasury Employees Union for divided argument denied.

No. 82–827. MINNESOTA *v.* MURPHY. Sup. Ct. Minn. [Certiorari granted, 459 U. S. 1145.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–1167. UNITED STATES *v.* JACOBSEN ET AL. C. A. 8th Cir. [Certiorari granted, 460 U. S. 1021.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 82–1200. DAILY INCOME FUND, INC., ET AL. *v.* FOX. C. A. 2d Cir. [Certiorari granted, 460 U. S. 1021.] Motion of Investment Company Institute for leave to file a brief as *amicus curiae* granted.

No. 82–1273. MAINE *v.* THORNTON. Sup. Jud. Ct. Me. [Certiorari granted, 460 U. S. 1068.] Motion for appointment of counsel granted, and it is ordered that Donna L. Zeegers, of Augusta, Me., be appointed to serve as counsel for respondent in this case.

No. 82–1398. M/V POLLUX ET AL. *v.* GOODPASTURE, INC., 460 U. S. 1084. Motion of petitioners to require Advisory Committee on Civil Rules to make available to petitioners proposed amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims denied.

No. 82–1448. UNITED STATES *v.* STAUFFER CHEMICAL CO. C. A. 6th Cir. [Certiorari granted, 460 U. S. 1080.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 82–1564. LONEWOLF *v.* LONEWOLF. Sup. Ct. N. M.;

No. 82–1577. MICHIGAN CANNERS & FREEZERS ASSN., INC., ET AL. *v.* AGRICULTURAL MARKETING AND BARGAINING BOARD ET AL. Sup. Ct. Mich.; and

No. 82–1579. HAYFIELD NORTHERN RAILROAD CO., INC., ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. C. A. 8th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 82-1600. GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* NATIONAL STEEL SERVICE CENTER, INC. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82-6537. IN RE ROBINSON; and
No. 82-6552. IN RE CORRADO ET AL. Petitions for writs of habeas corpus denied.

No. 82-6399. IN RE JOHNSON; and
No. 82-6436. IN RE BEHRENS ET AL. Petitions for writs of mandamus denied.

Certiorari Granted

No. 82-1326. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* CALIFORNIA ET AL.;
No. 82-1327. WESTERN OIL & GAS ASSN. ET AL. *v.* CALIFORNIA ET AL.; and
No. 82-1511. CALIFORNIA ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 683 F. 2d 1253.

No. 82-1349. UNITED STATES *v.* S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES) ET AL.; and
No. 82-1350. UNITED STATES *v.* UNITED SCOTTISH INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 82-1349, 692 F. 2d 1205; No. 82-1350, 692 F. 2d 1209.

No. 82-1453. BADARACCO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and
No. 82-1509. DELEET MERCHANDISING CORP. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 693 F. 2d 298.

No. 82–1474. HOOVER ET AL. *v.* RONWIN ET AL. C. A. 9th Cir. Motion of National Conference of Bar Examiners for leave to file a brief as *amicus curiae* granted. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 686 F. 2d 692.

Certiorari Denied. (See also No. 82–1558, *supra.*)

No. 81–1946. CLARK, DBA RICHARD CLARK CONSTRUCTION, ET AL. *v.* PADDACK ET AL., TRUSTEES. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1339.

No. 81–2209. MCDOWELL ET UX., DBA MCDOWELL'S, ET AL. *v.* WESTERN WASHINGTON LABORERS-EMPLOYERS HEALTH & SECURITY TRUST FUND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1341.

No. 82–889. OVERHEAD DOOR COMPANY OF METROPOLITAN WASHINGTON *v.* WASHINGTON AREA CARPENTERS' WELFARE FUND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 273, 681 F. 2d 1.

No. 82–967. ISENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 118.

No. 82–1039. DUNN *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 82–1144. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, LOCAL 1968 *v.* FEDERAL LABOR RELATIONS AUTHORITY. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 376, 691 F. 2d 565.

No. 82–1180. DORANZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 986.

No. 82–1194. DUNN *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 647 S. W. 2d 3.

No. 82-1215. PAUL ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 445, 687 F. 2d 364.

No. 82-1226. LAIRD *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 691 F. 2d 147.

No. 82-1258. BRAEMOOR ASSOCIATES ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 7th Cir. Certiorari denied. Reported below: 686 F. 2d 550.

No. 82-1266. EISENBERG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 894.

No. 82-1292. SPRINGDALE SCHOOL DISTRICT NO. 50 OF WASHINGTON COUNTY *v.* GRACE, A MINOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 41.

No. 82-1302. SEA-LAND SERVICE, INC. *v.* AKERMANIS. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 898.

No. 82-1303. BUTTREY ET AL. *v.* UNITED STATES ET AL. (two cases). C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 1170 (first case); 690 F. 2d 1186 (second case).

No. 82-1355. YELLOWFISH ET AL. *v.* CITY OF STILLWATER, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 691 F. 2d 926.

No. 82-1393. KAUFMAN *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 547.

No. 82-1404. NIGRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 705 F. 2d 1224.

No. 82-1424. CHAMBERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1233.

No. 82-1433. RICHARDSON *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 689 F. 2d 632.

No. 82-1444. STOUTT *v.* OREGON EX REL. ADULT AND FAMILY SERVICES DIVISION. Ct. App. Ore. Certiorari denied. Reported below: 57 Ore. App. 303, 644 P. 2d 1132.

No. 82-1447. AFSHAR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 751.

No. 82-1460. AVCOLLIE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 188 Conn. 626, 453 A. 2d 418.

No. 82-1473. DIXIE FINANCE CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 926.

No. 82-1497. BRIGGS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 614.

No. 82-1501. MUSICO *v.* MUSICO, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MUSICO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 422 So. 2d 31.

No. 82-1516. SEA PINES CO. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 973.

No. 82-1521. TAMARA FOODS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 692 F. 2d 1171.

No. 82-1530. TURNER *v.* UNITED STATES; and

No. 82-1533. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 1289.

No. 82–1540. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. *v.* QASIM ET AL. Ct. App. D. C. Certiorari denied. Reported below: 455 A. 2d 904.

No. 82–1542. HEWITT ET AL. *v.* STRICKLAND, REVENUE COMMISSIONER OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 191.

No. 82–1543. REEDMAN *v.* RUSSO. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 89 App. Div. 2d 623, 452 N. Y. S. 2d 860.

No. 82–1548. EPPS *v.* BAER. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 989.

No. 82–1551. BRYANT ELECTRIC CO. ET AL. *v.* KISER, INDIVIDUALLY, AND AS ANCILLIARY ADMINISTRATRIX OF THE ESTATE OF KISER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 695 F. 2d 207.

No. 82–1556. DUFFY, SHERIFF OF SAN DIEGO COUNTY, CALIFORNIA *v.* BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 1185.

No. 82–1557. I/S NOREXIM ET AL. *v.* GULF TRADING & TRANSPORTATION CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 1191.

No. 82–1559. KONDRAT *v.* CITY OF WILLOUGHBY HILLS. Ct. App. Ohio, Lake County. Certiorari denied.

No. 82–1561. COUSINO *v.* STAIR, PERSONAL REPRESENTATIVE OF THE ESTATE OF STAIR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 722.

No. 82–1562. TIMMONS *v.* ZONING BOARD OF ADJUSTMENT ET AL. Sup. Ct. S. C. Certiorari denied.

No. 82–1566. BARANAN *v.* FULTON COUNTY. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 531, 299 S. E. 2d 722.

No. 82–1568. Browne et al. *v.* McDonnell Douglas Corp. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 370.

No. 82–1572. Neely *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 296 Pa. Super. 553, 438 A. 2d 628.

No. 82–1574. New York *v.* Cohen. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 844, 446 N. E. 2d 774.

No. 82–1575. Ware *v.* King, Secretary, Department of Correction, et al. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 89.

No. 82–1576. American College of Otorhinolaryngologists, Formerly Known as American Board of Otorhinolaryngology *v.* American Board of Otolaryngology. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 111.

No. 82–1583. S/S Cove Ranger et al. *v.* St. George Packing Co., Inc. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 769.

No. 82–1599. City of St. Louis et al. *v.* Firefighters Institute for Racial Equality et al. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1001.

No. 82–1609. Long *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1164.

No. 82–1611. New Orleans Steamboat Co. et al. *v.* M/T Exxon Baltimore et al. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 994.

No. 82–1612. Ahmed *v.* Environmental Protection Agency. C. A. D. C. Cir. Certiorari denied. Reported below: 224 U. S. App. D. C. 160, 694 F. 2d 280.

No. 82–1620. LOCHNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1230.

No. 82–1626. FARESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 1343.

No. 82–1634. POST-NEWSWEEK STATIONS, FLORIDA, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 695 F. 2d 1278.

No. 82–1638. BRADLEY *v.* SEGAL ET AL. Sup. Ct. Va. Certiorari denied.

No. 82–1641. WILSON ET AL. *v.* CRAWFORD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 693 F. 2d 606.

No. 82–1647. COUNCIL 13, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL–CIO, BY MCENTEE, TRUSTEE AD LITEM, ET AL. *v.* PENNSYLVANIA DEPARTMENT OF JUSTICE, BOARD OF CORRECTIONS. Sup. Ct. Pa. Certiorari denied. Reported below: 499 Pa. 268, 452 A. 2d 1348.

No. 82–1664. CHAPPELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 308.

No. 82–1688. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 729.

No. 82–1689. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 2d 299.

No. 82–1693. SHEERAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 699 F. 2d 112.

No. 82–1695. ALFARANO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 739.

No. 82–1715. BIFIELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 2d 342.

No. 82-6043. MUNOZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 134.

No. 82-6081. SMITH *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 851.

No. 82-6090. SMITH *v.* WYRICK, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 82-6091. CARTER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 641 S. W. 2d 54.

No. 82-6126. BRYANT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 686 F. 2d 1373.

No. 82-6128. CUSINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 185.

No. 82-6141. ADAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6149. AL MUDARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 1182.

No. 82-6168. ENOCH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 694 F. 2d 465.

No. 82-6190. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 563.

No. 82-6223. GORDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82-6287. PETTWAY ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1387.

No. 82-6350. JOHNSON *v.* COURTS OF OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 82–6352. GASQUE *v.* UNIDENTIFIED, WRECKED, AND ABANDONED SAILING VESSEL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–6362. LONDON *v.* REES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 185.

No. 82–6380. MARTIN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 189 Conn. 1, 454 A. 2d 256.

No. 82–6382. BAILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 1009.

No. 82–6398. DARR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–6400. HARRIS *v.* QUINLAN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 113.

No. 82–6402. BAILEY *v.* OLIVER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 695 F. 2d 1323.

No. 82–6406. ERBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 108 Ill. App. 3d 1209, 446 N. E. 2d 317.

No. 82–6407. MINNEMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 441 N. E. 2d 673.

No. 82–6410. CHOTE *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 82–6415. JOHNSON *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 82–6417. ADAMS *v.* EMPLOYMENT DEVELOPMENT DEPARTMENT, UNEMPLOYMENT INSURANCE APPEALS BOARD, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82-6429. HARVEY *v.* BREEDING ET AL. C. A. 5th Cir. Certiorari denied.

No. 82-6432. JOOST *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 82-6434. YOUNGBLOOD *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 407.

No. 82-6435. HARVEY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 82-6437. WARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1315.

No. 82-6439. REITER *v.* HUFFMAN, SHERIFF. Sup. Ct. Tex. Certiorari denied.

No. 82-6440. BROADWAY *v.* STAFFORD. C. A. 11th Cir. Certiorari denied.

No. 82-6442. HERNANDEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1230.

No. 82-6443. MITCHELL *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 104 Idaho 493, 660 P. 2d 1336.

No. 82-6445. SOPIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 304 Pa. Super. 620, 450 A. 2d 1053.

No. 82-6446. MCDONALD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 82-6454. UNITED STATES EX REL. MCINERY *v.* SHELLY, SHERIFF OF WILL COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 2d 101.

No. 82-6457. SMITH *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 650 S. W. 2d 446.

No. 82-6458. WILLIAMS *v.* DALLAS COUNTY SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 82-6460. ALSTON *v.* TARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6461. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 697.

No. 82-6462. JACKSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 994.

No. 82-6468. LEVENTHAL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 763.

No. 82-6469. RODZIEWICZ *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 82-6473. HENDERSON *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 760.

No. 82-6476. PLYLER *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 753.

No. 82-6477. SAULSBURY *v.* GREER, WARDEN, MENARD CORRECTIONAL CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 2d 651.

No. 82-6478. FOSTER *v.* BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 82-6503. CASTANEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 563.

No. 82-6504. SESSO *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6507. HAYDEN *v.* UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS. C. A. 10th Cir. Certiorari denied.

No. 82-6508. HUNTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6511. GIBBS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6512. CAVANAUGH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82-6516. TAYLOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 451 A. 2d 859.

No. 82-6519. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 994.

No. 82-6522. PARISI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82-6524. SOCKWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 213.

No. 82-6526. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 446.

No. 82-6532. BURNETTE *v.* UNITED STATES; and
No. 82-6533. BURNETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1038.

No. 82-6540. ALFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 186.

No. 82-6545. FRANKUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 581.

No. 82-6566. EVERETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–6547. ARANA-ARGUELLO *v.* UNITED STATES; and No. 82–6578. VELIZ-VALLARDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 2d 227.

No. 82–6548. HUFF ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 699 F. 2d 1027.

No. 82–6572. OLIVER ET AL. *v.* HUNTINGDON COUNTY COMMISSIONERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–1259. ILLINOIS *v.* SMITH. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 93 Ill. 2d 179, 442 N. E. 2d 1325.

No. 82–1285. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* FRENCH. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 692 F. 2d 1021 and 696 F. 2d 318.

No. 82–1578. ALABAMA *v.* JOHNSON. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 425 So. 2d 515.

No. 82–1311. JEWELL PRODUCTIONS, INC., AKA EROS, ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and vacate the conviction.

No. 82–1324. NATIONAL FARMERS' ORGANIZATION, INC. *v.* ASSOCIATED MILK PRODUCERS, INC., ET AL. C. A. 8th Cir. Motion of Cooperative League of the United States of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition. Reported below: 687 F. 2d 1173.

No. 82–1331. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 82–1352. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Motions of Maryland Office of People's Counsel, Washington Utilities and Transportation Commission, Florida Public Service Commission, South Carolina Department of Consumer Affairs, and Utah Public Service Commission for leave to file briefs as *amici curiae* granted. Motion of Arkansas et al. for leave to file a brief as *amici curiae* in No. 82–1331 granted. Certiorari denied. JUSTICE BLACKMUN and JUSTICE POWELL took no part in the consideration or decision of these motions and these petitions. Reported below: 224 U. S. App. D. C. 83, 693 F. 2d 198.

No. 82–1571. FIRST ALABAMA BANK OF MONTGOMERY, N.A. *v.* MARTIN ET AL. Sup. Ct. Ala. Motion of American Bankers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 425 So. 2d 415.

No. 82–1573. RONWIN *v.* HOOVER ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 686 F. 2d 692.

No. 82–1582. CENTRAL MILK PRODUCERS COOPERATIVE *v.* NATIONAL FARMERS' ORGANIZATION, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 687 F. 2d 1173.

No. 82–1585. ASSOCIATED MILK PRODUCERS, INC. *v.* NATIONAL FARMERS' ORGANIZATION, INC., ET AL.; and

No. 82-1586. MID-AMERICA DAIRYMEN, INC. *v.* NATIONAL FARMERS' ORGANIZATION, INC., ET AL. C. A. 8th Cir. Motion of National Milk Producers Federation for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this motion and these petitions. Reported below: 687 F. 2d 1173.

No. 82-1606. BLUME ET AL. *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 684 F. 2d 1166.

No. 82-6104. FOLSTON *v.* ALLSBROOK ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 691 F. 2d 184.

No. 82-6267. EVANS *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 82-6423. BOLANDER *v.* FLORIDA. Sup. Ct. Fla.;
No. 82-6433. ALDRIDGE *v.* FLORIDA. Sup. Ct. Fla.; and
No. 82-6555. MCCRAE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 82-6267, 422 So. 2d 737; No. 82-6423, 422 So. 2d 833; No. 82-6433, 425 So. 2d 1132; No. 82-6555, 422 So. 2d 824.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. D-309. IN RE DISBARMENT OF MCCLELLAN, 460 U. S. 1049. Motion for leave to file petition for rehearing denied.

No. 82-5992. KILBANE ET AL. *v.* MARSHALL ET AL., 460 U. S. 1053;

No. 82-6035. QUINTANA *v.* VIRGINIA, 460 U. S. 1029;

No. 82-6062. FORNASH *v.* MARSHALL, 460 U. S. 1042;

No. 82-6078. RONSON *v.* COMMISSIONER OF INTERNAL REVENUE, 460 U. S. 1043;

No. 82-6148. JOHL ET AL. *v.* MOUKAWSHER ET AL., 460 U. S. 1054;

No. 82-6200. MARAS *v.* AMMERMAN, 460 U. S. 1071; and

No. 82-6221. EVANS *v.* UNITED STATES, 460 U. S. 1055. Petitions for rehearing denied.

No. 82-6135. STALLWORTH *v.* DETROIT BOARD OF EDUCATION ET AL., 460 U. S. 1025. Motion for leave to file petition for rehearing denied.

MAY 23, 1983

Certiorari Granted—Reversed and Remanded. (See No. 82-1496, *ante*, p. 571.)

Certiorari Granted—Vacated and Remanded

No. 80-1158. FLORIDA *v.* RODRIGUEZ. Dist. Ct. App. Fla., 3d Dist. Petition for rehearing granted. The order entered May 26, 1981 [451 U. S. 1022], denying the petition for writ of certiorari is vacated. Certiorari is granted, the judgment is vacated, and the case is remanded for further consideration in light of *Florida* v. *Royer*, 460 U. S. 491 (1983). JUSTICE BRENNAN would deny the petition.

No. 82-328. BORDEN, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with directions that it remand the case to the Federal Trade Commission for entry of the cease-and-desist order to which the parties have agreed. Reported below: 674 F. 2d 498.

Miscellaneous Orders

No. D-341. IN RE DISBARMENT OF SCACCHETTI. It is ordered that Carl R. Scacchetti, Jr., of Rochester, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–342. IN RE DISBARMENT OF BAKER. It is ordered that John David Baker, of Rochester, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–343. IN RE DISBARMENT OF MCGRATH. It is ordered that Thomas Francis McGrath, Jr., of Seattle, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–344. IN RE DISBARMENT OF STROH. It is ordered that Hugh William Stroh, of Bellevue, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–345. IN RE DISBARMENT OF WALGREN. It is ordered that Gordon Lee Walgren, of Bremerton, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81–1044. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS, 460 U. S. 711. Motion of respondent to retax costs denied. JUSTICE BLACKMUN would grant this motion.

No. 81–2147. ARIZONA ET AL. *v.* SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.; ARIZONA ET AL. *v.* NAVAJO TRIBE OF INDIANS ET AL.; and

No. 81–2188. MONTANA ET AL. *v.* NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 821.] Motion of respondents San Carlos Apache Tribe of Arizona et al. for leave to file a supplemental brief after argument granted.

No. 82–357. MICHIGAN *v.* CLIFFORD ET AL. Ct. App. Mich. [Certiorari granted, 459 U. S. 1168.] Further consideration of respondents' motion partially to vacate the writ of certiorari as improvidently granted is deferred to the hearing of the case on the merits.

No. 82–945. SURE-TAN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 460 U. S. 1021.] Motion of petitioners to proceed further herein *in forma pauperis* denied. Motion of petitioners to dispense with printing the joint appendix granted.

No. 82–1414. PRATT-FARNSWORTH, INC., ET AL. *v.* CARPENTERS LOCAL UNION NO. 1846 OF THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–1761. IN RE HANSON. Petition for writ of habeas corpus denied.

No. 82–1746. IN RE KARAPINKA. Petition for writ of mandamus denied.

Certiorari Granted

No. 82–1213. NEW YORK *v.* QUARLES. Ct. App. N. Y. Certiorari granted. Reported below: 58 N. Y. 2d 664, 444 N. E. 2d 984.

Certiorari Denied

No. 82–834. WALCK *v.* AMERICAN STOCK EXCHANGE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 687 F. 2d 778.

No. 82-1023. CALLAHAN ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 426 So. 2d 801.

No. 82-1373. MILLER *v.* PITTSTON STEVEDORING CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 983.

No. 82-1384. ALCAN SALES, DIVISION OF ALCAN ALUMINUM CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 693 F. 2d 1089.

No. 82-1395. DRURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 687 F. 2d 63.

No. 82-1403. INTERNATIONAL FASHIONS *v.* BUCHANAN ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 703 F. 2d 584.

No. 82-1437. HOMEWOOD CITY BOARD OF EDUCATION ET AL. *v.* AVERY. C. A. 11th Cir. Certiorari denied. Reported below: 674 F. 2d 337.

No. 82-1515. BUCKS COUNTY WATER AND SEWER AUTHORITY *v.* DELAWARE RIVER BASIN COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1389.

No. 82-1532. ALYESKA PIPELINE SERVICE CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 231 Ct. Cl. 540, 688 F. 2d 765.

No. 82-1545. KAISER *v.* CONSOLIDATED RAIL CORPORATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 454.

No. 82-1590. STITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82-1598. VAUGHAN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 59 N. C. App. 318, 296 S. E. 2d 516.

No. 82-1601. GILMORE *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1502.

No. 82-1603. TOYBOX CORP. *v.* ILLFELDER TOY CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 117.

No. 82-1604. DEWEY *v.* UNIVERSITY OF NEW HAMPSHIRE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 694 F. 2d 1.

No. 82-1605. MCGINNIS *v.* LANGHORNE MANOR BOROUGH. Pa. Commw. Ct. Certiorari denied. Reported below: 68 Pa. Commw. 57, 448 A. 2d 108.

No. 82-1613. HELMERICH & PAYNE, INC. *v.* ROCK ISLAND IMPROVEMENT CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 698 F. 2d 1075.

No. 82-1617. NITZ *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 332 N. W. 2d 107.

No. 82-1618. BENSON *v.* SCHWARTZ ET AL. Sup. Ct. Va. Certiorari denied.

No. 82-1619. ILLINOIS *v.* TILLER. Sup. Ct. Ill. Certiorari denied. Reported below: 94 Ill. 2d 303, 447 N. E. 2d 174.

No. 82-1622. BARUCH *v.* SHERIFF OF COOK COUNTY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 1200, 439 N. E. 2d 1113.

No. 82-1623. AMERICAN AIRLINES, INC. *v.* BRANIFF AIRWAYS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 700 F. 2d 214.

No. 82-1637. STENDEBACH *v.* CPC INTERNATIONAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 735.

No. 82-1640. WILLIAMS *v.* PASMA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 656 P. 2d 212.

No. 82-1642. DRURY ET AL. *v.* WESTBOROUGH MALL, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 733.

No. 82-1659. ROBINSON ET AL. *v.* CUMBERLAND CAPITAL CORP. ET AL. Ct. App. Tenn. Certiorari denied.

No. 82-1707. ORLOSKI *v.* MELLENBERG, JUDGE, COURT OF COMMON PLEAS. Super. Ct. Pa. Certiorari denied. Reported below: 305 Pa. Super. 75, 451 A. 2d 249.

No. 82-1741. ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82-6214. LOCKLEAR *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 990.

No. 82-6234. PARKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 451 A. 2d 591.

No. 82-6299. WADDELL *v.* UNITED STATES; and
No. 82-6300. MURPHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 282.

No. 82-6327. MUMIT *v.* HENDERSON. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 115.

No. 82-6408. BARLOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 693 F. 2d 954.

No. 82-6449. MAZZEI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 700 F. 2d 85.

No. 82-6479. NAVARRE *v.* LOUISIANA. 15th Jud. Dist. Ct. La., Vermilion Parish. Certiorari denied.

No. 82-6481. SMITH *v.* FAIRMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 690 F. 2d 122.

No. 82-6487. GADOMSKI *v.* UNITED STATES STEEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1390.

No. 82-6490. HADDIX *v.* ST. ELIZABETH MEDICAL CENTER. Sup. Ct. Ohio. Certiorari denied.

No. 82-6491. JOHNSON *v.* FIELDS ET AL. C. A. 10th Cir. Certiorari denied.

No. 82-6492. MCDONALD *v.* HUMPHRIES ET AL. C. A. 6th Cir. Certiorari denied.

No. 82-6493. ARMSTRONG *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 110 Wis. 555, 329 N. W. 2d 386.

No. 82-6494. COOK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 691, 444 N. E. 2d 1017.

No. 82-6501. RIVERA *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 82-6505. KINCAID *v.* DUCKWORTH, WARDEN, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 702.

No. 82-6506. BRIDGEFORTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 168.

No. 82-6517. MELIA *v.* FISCHER & PORTER CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1393.

No. 82-6521. ROTHWELL *v.* BAILEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 991.

No. 82-6528. LADEN *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 725.

No. 82-6529. HUFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 699 F. 2d 1027.

No. 82-6530. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 700 F. 2d 1328.

No. 82-6574. HOLLOWAY *v.* LYNCH. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 165.

No. 82-6575. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82-6585. DREYFUS-DE CAMPOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 2d 227.

No. 82-6593. BUTTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1404.

No. 82-6603. BIVINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 171.

No. 82-6608. GRAHAM ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 700 F. 2d 427.

No. 82-6623. WELTY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 82-6624. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 579.

No. 82-6630. SCHLACKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 2d 408.

No. 82-6639. GRAINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 308.

No. 82-1319. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS *v.* GRIZZELL. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 692 F. 2d 722.

No. 82-1321. HIGA, JUDGE OF THE SECOND CIRCUIT OF HAWAII *v.* MAYO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 692 F. 2d 595.

No. 82-6483. TALIAFERRO *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 295 Md. 376, 456 A. 2d 29.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

Maryland requires criminal defendants, upon request, to provide the State with the name and address of each alibi witness they wish to call at trial. Md. Rule Proc. 741. As a sanction for failure to abide by this Rule, the trial court has the discretion to prohibit the defendant from introducing the testimony of an undisclosed alibi witness. *Ibid.* This case presents the question whether the exclusion of a witness merely for failure to abide by a discovery rule such as Rule 741 impermissibly infringes upon a defendant's Sixth Amendment right to offer witnesses on his behalf. See *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973); *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

On the second day of trial in the present case, petitioner sought to call Edward Rich as an alibi witness, even though Rich had not been named in response to the State's Rule 741 request. The State indicated that it would have no objection to Rich's testifying if the case were continued for a few days, so that an investigation of Rich could be conducted. The trial court declined to order a continuance; instead, it ordered that Rich not be permitted to testify. The court did not find that petitioner's violation of Rule 741 was deliberate; rather, it found that petitioner had not been "diligent" and "hadn't made any real effort, except yesterday, to locate this witness." App. to Pet. for Cert. A–90—A–91. The court's ruling severely prejudiced petitioner, since alibi was his only defense, and Rich was his only alibi witness. Petitioner was convicted, and the Maryland Court of Appeals affirmed by a 4–3 vote. 295 Md. 376, 456 A. 2d 29 (1983). The dissent vigorously protested that where, as here, the sanction of exclusion deprives a defendant of his only alibi witness, the violation of the discovery rule is not deliberate, and any prejudice to the prosecution can be cured by a short continuance, the exclusionary sanction violates the defendant's Sixth and Fourteenth Amendment rights. *Id.*, at 398, 456 A. 2d, at 41 (Eldridge, J., dissenting).

This Court has twice expressly reserved judgment on this Sixth Amendment question. *Wardius* v. *Oregon*, 412 U. S. 470, 472, n. 4 (1973); *Williams* v. *Florida*, 399 U. S. 78, 83, n. 14 (1970). Respondent concedes that the question is significant. Brief in Opposition 1. At least one Federal Court of Appeals has flatly held "that the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States* v. *Davis*, 639 F. 2d 239, 243 (CA5 1981). Accord, *Hackett* v. *Mulcahy*, 493 F. Supp. 1329 (NJ 1980). See also *Ronson* v. *Commissioner of Correction*, 604 F. 2d 176 (CA2 1979). The American Bar Association and several scholarly writers have also found arguable constitutional infirmity in the exclusionary sanction. See ABA Standards for Criminal Justice 11–4.7(a), and accompanying commentary (2d ed. 1980); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 838–839 (1976); Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 137–139 (1974); Note, 81 Yale L. J. 1342 (1972).

By the count of the Court of Appeals majority, 35 States and the District of Columbia have provisions similar to Rule 741 that allow the exclusion of evidence as a penalty for noncompliance with discovery rules. See 295 Md., at 387, 456 A. 2d, at 35. Rule 12.1 of the Federal Rules of Criminal Procedure also allows such a sanction to be assessed. One State apparently even *requires* the exclusionary sanction to be applied when a defendant fails to disclose his witness. See Mich. Comp. Laws Ann. §§ 768.20, 768.21 (1982). In light of the sharp disagreement in the legal community as to the constitutionality of this penalty, I would grant certiorari and resolve this recurring issue.

Rehearing Granted. (See No. 80–1158, *supra.*)

Rehearing Denied

No. 81–6746. MEDINA-PENA *v.* UNITED STATES, 460 U. S. 1068;

No. 82–1328. PFOTZER ET AL. *v.* UNITED STATES, 460 U. S. 1052;

No. 82–1445. THE DON'T BANKRUPT WASHINGTON COMMITTEE *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL., 460 U. S. 1077;

No. 82–6238. JONES ET AL. *v.* MITCHELL ET AL., 460 U. S. 1064;

No. 82–6239. JONES ET AL. *v.* JEFFERSON PARISH SCHOOL BOARD, 460 U. S. 1064; and

No. 82–6260. HARRISON *v.* OKLAHOMA, 460 U. S. 1090. Petitions for rehearing denied.

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Appeals Dismissed. (See also No. 82–1401, *infra.*)

No. 82–1307. GRAHAM *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 422 So. 2d 123.

No. 82–1663. FLEISCHMANN, TRUSTEE *v.* WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL. Appeal from App. Sess., Super. Ct. Conn., Hartford-New Britain

Jud. Dist., dismissed for want of substantial federal question. Reported below: 38 Conn. Supp. 590, 456 A. 2d 791.

No. 82-1588. LEE M. SCARBOROUGH & CO. *v.* FOX, SPECIAL DEPUTY COMMISSIONER OF INSURANCE OF WISCONSIN FOR THE LIQUIDATION OF ALL-STAR INSURANCE CORP., ET AL.; and

No. 82-1628. APS INSURANCE AGENCY, INC. *v.* FOX, SPECIAL DEPUTY COMMISSIONER OF INSURANCE OF WISCONSIN FOR THE LIQUIDATION OF ALL-STAR INSURANCE CORP., ET AL. Appeals from Sup. Ct. Wis. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE POWELL would note probable jurisdiction and set cases for oral argument. Reported below: 110 Wis. 2d 72, 327 N. W. 2d 648.

No. 82-6075. SCHLANG *v.* HEARD, SHERIFF. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 691 F. 2d 796.

No. 82-6274. JONES *v.* ORLEANS PARISH SCHOOL BOARD. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 688 F. 2d 342.

No. 82-6496. COUNSELL *v.* MUNRO-BURNS GENERAL CONTRACTORS. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 3 Haw. App. 681.

Certiorari Granted—Vacated and Remanded

No. 81-1399. CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL. *v.* MANHART ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hensley* v. *Eckerhart, ante,* p. 424. Reported below: 652 F. 2d 904.

No. 81–1830. EARL B. MILLER & CO. *v.* HUGHES. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hensley* v. *Eckerhart, ante,* p. 424. JUSTICE STEVENS dissents and would deny certiorari. Reported below: 698 F. 2d 1220.

No. 82–156. CITY OF RIVERSIDE ET AL. *v.* RIVERA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hensley* v. *Eckerhart, ante,* p. 424. Reported below: 679 F. 2d 795.

No. 82–192. DELTA AIR LINES, INC. *v.* THORNBERRY ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hensley* v. *Eckerhart, ante,* p. 424. Reported below: 676 F. 2d 1240.

No. 82–747. BOND ET AL. *v.* BURKS ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hensley* v. *Eckerhart, ante,* p. 424. JUSTICE BLACKMUN and JUSTICE STEVENS dissent and would deny certiorari. Reported below: 691 F. 2d 503.

No. 82–816. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* BROZ ET AL. C. A. 11th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Heckler* v. *Campbell, ante,* at 464, n. 8. Reported below: 677 F. 2d 1351.

No. 82–1335. RHODES ET AL. *v.* STEWART. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hensley* v. *Eckerhart, ante,* p. 424. Reported below: 703 F. 2d 566.

Miscellaneous Orders

No. — — ——. KOPITUK ET AL. *v.* UNITED STATES. Motion of petitioners for leave to file an appendix to the petition for writ of certiorari that does not comply with the Rules of this Court granted.

No. A–872. DABEIT *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–933. WEECH ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application to recall and stay the mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–328. IN RE DISBARMENT OF JUNCKER. Disbarment entered. [For earlier order herein, see 460 U. S. 1019.]

No. D–330. IN RE DISBARMENT OF BLUESTEIN. Disbarment entered. [For earlier order herein, see 460 U. S. 1049.]

No. D–346. IN RE DISBARMENT OF HOLLINGSWORTH. It is ordered that Frederick E. Hollingsworth, of Boca Raton, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–347. IN RE DISBARMENT OF ROCAP. It is ordered that Read Rocap, Jr., of Media, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–348. IN RE DISBARMENT OF DAVIS. It is ordered that Gary A. Davis, of Columbia, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–349. IN RE DISBARMENT OF BUTLER. It is ordered that Paul A. Butler, of South Natick, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–350. IN RE DISBARMENT OF BUCCI. It is ordered that Andrew A. Bucci, of North Providence, R. I., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81–2159. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD *v.* KERR-MCGEE CORP. ET AL. C. A. 10th Cir. [Probable jurisdiction postponed, 459 U. S. 1101.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–2169. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT, ET AL. *v.* PROSISE. C. A. 4th Cir. [Certiorari granted, 459 U. S. 904.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 81–2245. NEVADA *v.* UNITED STATES ET AL.;
No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and
No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 904.] Motion of petitioners in Nos. 81–2245 and 81–2276 for leave to file a supplemental brief after argument granted.

No. 82–432. LOCAL NO. 82, FURNITURE & PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN & PACKERS, ET AL. *v.* CROWLEY ET AL. C. A. 1st Cir.

[Certiorari granted, 459 U. S. 1168.] Motion of the Solicitor General for divided argument granted.

No. 82–818. NATIONAL LABOR RELATIONS BOARD *v.* BILDISCO & BILDISCO, DEBTOR-IN-POSSESSION, ET AL.; and

No. 82–852. LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1145.] Motions of United Mine Workers of America, International Union, and International Brotherhood of Teamsters for leave to file briefs as *amici curiae* granted.

No. 82–874. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* EDWARDS. C. A. 9th Cir. [Certiorari granted *sub nom. Schweiker* v. *Edwards*, 459 U. S. 1200.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 82–940. HISHON *v.* KING & SPALDING. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of Robert Abrams et al. for leave to file a brief as *amici curiae* granted.

No. 82–1041. DICKMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of D'Ancona & Pflaum for leave to participate in oral argument as *amicus curiae* denied.

No. 82–1127. HELICOPTEROS NACIONALES DE COLOMBIA, S.A. *v.* HALL ET AL. Sup. Ct. Tex. [Certiorari granted, 460 U. S. 1021.] Motion of Motor Vehicle Manufacturers Association of the United States, Inc., for leave to file a brief as *amicus curiae* granted.

No. 82–1401. CALDER ET AL. *v.* JONES ET AL. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction postponed, 460 U. S. 1080.] Appeal as to appellee Ingels dismissed. Motion of appellants to vacate the judgment of the Court of Appeal of California, Second Appellate District, as to Ingels denied.

Certiorari Granted

No. 81-1374. Blum, Commissioner, New York State Department of Social Services *v.* Stenson. C. A. 2d Cir. Certiorari granted. Reported below: 671 F. 2d 493.

No. 82-1253. Solem, Warden, South Dakota State Penitentiary, et al. *v.* Bartlett. C. A. 8th Cir. Certiorari granted. Reported below: 691 F. 2d 420.

No. 82-1005. Chevron U.S.A. Inc. *v.* Natural Resources Defense Council, Inc., et al.;

No. 82-1247. American Iron & Steel Institute et al. *v.* Natural Resources Defense Council, Inc., et al.; and

No. 82-1591. Ruckelshaus, Administrator, Environmental Protection Agency *v.* Natural Resources Defense Council, Inc., et al. C. A. D. C. Cir. Motion of Mid-America Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 222 U. S. App. D. C. 268, 685 F. 2d 718.

No. 82-1330. Thigpen, Commissioner, Mississippi Department of Corrections, et al. *v.* Roberts. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 693 F. 2d 132.

No. 82-1651. Nix, Warden of the Iowa State Penitentiary *v.* Williams. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 700 F. 2d 1164.

Certiorari Denied. (See also Nos. 82-6075, 82-6274, and 82-6496, *supra.*)

No. 81-2135. Uniroyal, Inc. *v.* Chrapliwy et al. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 760.

No. 81-6754. KIRK *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 524.

No. 82-1383. CINTOLO *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 82-1466. PATTERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 134.

No. 82-1504. L. G. EVERIST, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 231 Ct. Cl. 1013.

No. 82-1539. DRUKER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 46.

No. 82-1547. DABNEY *v.* MONTGOMERY WARD & CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 692 F. 2d 49.

No. 82-1581. QUENNEVILLE, EXECUTRIX OF THE ESTATE OF QUENNEVILLE *v.* DELMARK CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 727.

No. 82-1594. MILO *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 6 Ohio App. 3d 19, 451 N. E. 2d 1253.

No. 82-1624. R. R. GABLE, INC. *v.* BURROWS ET UX. Ct. App. Wash. Certiorari denied. Reported below: 32 Wash. App. 749, 649 P. 2d 177.

No. 82-1627. GREAT SOUTHWEST FIRE INSURANCE CO. *v.* ISON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 294.

No. 82-1629. BRITO ENTERPRISES, INC., T/A BRITO'S BOATYARD *v.* WESTBERRY. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 725.

No. 82-1632. BARGER *v.* PETROLEUM HELICOPTERS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 2d 337.

No. 82-1648. HORTON *v.* MARTIN, WARDEN, CENTRAL CORRECTIONAL INSTITUTE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 165.

No. 82-1665. ILLINOIS TOOL WORKS, INC. *v.* GRIP-PAK, INC. C. A. 7th Cir. Certiorari denied. Reported below: 694 F. 2d 466.

No. 82-1717. KROENING *v.* ARCHDIOCESE OF MILWAUKEE ET AL. Ct. App. Wis. Certiorari denied. Reported below: 109 Wis. 2d 698, 327 N. W. 2d 723.

No. 82-1736. SABOUNI ET AL. *v.* LEAVER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 1003.

No. 82-1748. CARLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 F. 2d 1133.

No. 82-1774. CUTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 729.

No. 82-1782. HENSEL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 2d 18.

No. 82-1783. HILLARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 701 F. 2d 1052.

No. 82-1786. TRAINELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1087.

No. 82-1790. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82-5527. RIOS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 824.

No. 82-5539. PICARD *v.* SECRETARY OF HEALTH AND HUMAN SERVICES; and SHERWIN *v.* SECRETARY OF HEALTH

AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 1 (second case).

No. 82-6254. ELAIRE *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 424 So. 2d 246.

No. 82-6344. GRANTT ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 82-6411. BENNETT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6495. LANGFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 1088.

No. 82-6497. AKBAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 378.

No. 82-6509. BRESSLER, DBA MARIE'S ORIGINALS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 82-6510. SHAO FEN CHIN, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF KE-SIEN CHIN *v.* ST. LUKE'S HOSPITAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 117.

No. 82-6513. BRADFORD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 82-6515. PEPPERS *v.* TARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6518. ADAMS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 423 So. 2d 439.

No. 82-6520. PEARSON *v.* CONKLIN. C. A. 8th Cir. Certiorari denied.

No. 82-6523. WEBB *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 661 P. 2d 904.

No. 82-6527. BIGG *v.* UNITED STATES ARMY. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 727.

No. 82-6531. GOODRICH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 80 App. Div. 2d 562, 435 N. Y. S. 2d 758.

No. 82-6550. MULLEN *v.* STARR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1000.

No. 82-6565. MASTERS *v.* OHIO. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 82-6569. LEONE *v.* DORAN ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 388 Mass. 1102, 445 N. E. 2d 156.

No. 82-6580. ANDERSON *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6596. MCGAVRAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 446.

No. 82-6602. MURRELL *v.* BENNETT, COMMISSIONER OF ALABAMA BOARD OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 2d 1093.

No. 82-6643. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82-6651. CHRISTOPHER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 1253.

No. 82-6652. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 2d 1215.

No. 82-6654. GREEN *v.* WARDEN, U. S. PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 364.

No. 82-6660. CLEMONS *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1491.

No. 82-6666. TRIGNANI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 82–6668. DUNCAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 971.

No. 82–6669. GASTELUM-ALMEIDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82–1183. LEDERER *v.* UNITED STATES;
No. 82–1187. MURPHY *v.* UNITED STATES;
No. 82–1199. THOMPSON *v.* UNITED STATES;
No. 82–1240. CRIDEN *v.* UNITED STATES; and
No. 82–1255. MYERS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of American Civil Liberties Union Foundation in No. 82–1199 for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 692 F. 2d 823.

No. 82–1289. CHICAGO HOUSING AUTHORITY *v.* GAUTREAUX ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 690 F. 2d 601.

No. 82–1381. MCCRAY *v.* NEW YORK. Ct. App. N. Y.;
No. 82–5840. MILLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist.; and
No. 82–5910. PERRY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 82–1381, 57 N. Y. 2d 542, 443 N. E. 2d 915; No. 82–5840, 104 Ill. App. 3d 1205, 437 N. E. 2d 945; No. 82–5910, 420 So. 2d 139.

Opinion of JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, respecting the denial of the petitions for writs of certiorari.

My vote to deny certiorari in these cases does not reflect disagreement with JUSTICE MARSHALL's appraisal of the importance of the underlying issue—whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group. I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two State Supreme Courts have held that a criminal defendant's rights under state constitutional provisions are violated in some circumstances by the prosecutor's use of peremptory challenges to exclude members of particular racial, ethnic, religious, or other groups from the jury. *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979).* That premise, understandably, has given rise to litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges, which had traditionally been final and unreviewable. See, *e. g.*, *People* v. *Allen*, 23 Cal. 3d 286, 292, 590 P. 2d 30, 33 (1979); *People* v. *Fuller*, 136 Cal. App. 3d

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*Although these cases present only the question of peremptory challenges on racial grounds, the same constitutional claims may also apply to the exclusion of other identifiable groups. The California Supreme Court has held that the State may not use peremptory challenges solely on the basis of religious, ethnic, or similar group affiliations. See *People* v. *Wheeler*, 22 Cal. 3d, at 272, 583 P. 2d, at 758 (relying on both the Sixth Amendment to the United States Constitution and Art. I, § 16, of the California Constitution). Similarly, the Massachusetts Supreme Judicial Court has condemned peremptory challenges based on "sex, race, color, creed or national origin." *Commonwealth* v. *Soares*, 377 Mass., at 487–489, and nn. 29, 33, 387 N. E. 2d, at 515–516, and nn. 29, 33 (relying on Art. 12 of the Massachusetts Declaration of Rights). Cf. *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1980) (declaring constitutional right, apparently on state grounds, but not specifying whether groups other than racial groups are protected).

Furthermore, although these cases involve peremptory challenges by the prosecutor, the Massachusetts court in *Soares* held that the Commonwealth as well as the defense could challenge the improper exercise of such challenges. 377 Mass., at 489–490, n. 35, 387 N. E. 2d, at 517, n. 35; see *Commonwealth* v. *Reid*, 384 Mass. 247, 424 N. E. 2d 495 (1981).

403, 186 Cal. Rptr. 283 (1982); *People* v. *Rousseau*, 129 Cal. App. 3d 526, 536, 179 Cal. Rptr. 892, 897 (1982); *Commonwealth* v. *Walker*, 379 Mass. 297, 397 N. E. 2d 1105 (1979); *Commonwealth* v. *Kelly*, 10 Mass. App. 847, 406 N. E. 2d 1327 (1980); *Commonwealth* v. *Brown*, 11 Mass. App. 283, 416 N. E. 2d 218 (1981). In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

These cases present a significant and recurring question of constitutional law: whether the State's use of peremptory challenges to exclude all potential Negro jurors because of their race violates a criminal defendant's right to an impartial jury drawn from a fair cross section of the community.

In No. 82–1381, after a first trial had resulted in a hung jury, an all-white jury convicted a Negro of first- and second-degree robbery of a white victim. The prosecutor exercised his peremptory challenges to exclude all seven Negroes and one Hispanic who had been drawn as prospective trial jurors. Asserting that the prosecutor's actions violated the Constitution, petitioner moved for a mistrial, or alternatively, for a hearing to examine the prosecutor's motives in exercising the challenges. These motions were denied. The New York Court of Appeals subsequently affirmed the conviction by a vote of four to three. 57 N. Y. 2d 542, 443 N. E. 2d 915 (1982). Both the trial court and the Court of Appeals relied heavily on *Swain* v. *Alabama*, 380 U. S. 202 (1965), in rejecting petitioner's constitutional argument.

In No. 82–5840 and in No. 82–5910, all-white juries convicted Negro defendants of murdering white victims. In No. 82–5840, the prosecutor employed his peremptory challenges to exclude all 14 potential Negro jurors. In No. 82–5910, following the removal of three Negroes for cause, the prosecutor used his peremptory challenges to exclude every remaining Negro venireman. In both cases, counsel for petitioners unsuccessfully objected to the State's use of peremptory challenges to exclude all Negroes from the jury. The state appellate courts concluded that petitioners had merely shown that Negroes were excluded from the juries in their cases, not that the State had systematically excluded Negroes over a period of time. And in each case, respondents rely heavily upon *Swain* v. *Alabama*, *supra*, to defend the judgments below.

In *Swain*, a closely divided Court held that the prosecutor's use of peremptory challenges to strike Negroes from the jury panel in one particular case did not deny the defendant the equal protection of the laws. The majority reasoned: "The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." *Id.*, at 222. The majority conceded that circumstances might arise where "the purposes of the peremptory challenge are being perverted." *Id.*, at 224. But the majority stated that an equal protection claim would assume "added significance" only where "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . ." *Id.*, at 223.

In the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism.[1] Since *every* defendant is entitled to equal protection of the laws and should therefore be free from the invidious discrimination of state officials, it is difficult to understand why several must suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object.[2] Moreover, *Swain* is inconsistent with the rule established in other jury selection cases that a prima facie violation is established by showing that an all-white jury was selected and that the selection process incorporated a mechanism susceptible to discriminatory application, irrespective of when in the selection process that opportunity arose.[3] Finally, the standard of proof for discrimination in *Swain* imposes a nearly insurmountable burden on defendants.[4] For

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[1] See, *e. g.*, Martin, The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury, 4 Hous. L. Rev. 448 (1966); Note, The Supreme Court, 1964 Term, 79 Harv. L. Rev. 56, 135–139 (1965); Comment, *Swain* v. *Alabama:* A Constitutional Blueprint for the Perpetu-

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ation of the All-White Jury, 52 Va. L. Rev. 1157 (1966); Note, Fair Jury Selection Procedures, 75 Yale L. J. 322 (1965); Note, Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss. L. J. 157 (1967); Note, The Jury: A Reflection of the Prejudices of the Community, 20 Hastings L. J. 1417 (1969); Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U. L. J. 662 (1974); Comment, The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause, 46 U. Cin. L. Rev. 554 (1977); Recent Development, Racial Discrimination in Jury Selection, 41 Albany L. Rev. 623 (1977); Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L. J. 1715 (1977).

[2] As one state court justice has written: "Is justice to sit supinely by and be flaunted in case after case before a remedy is available? Is justice only obtainable after repeated injustices are demonstrated? Is there any justification within the traditions of the Anglo-Saxon legal philosophy that permits the use of a presumption to hide the existence of an obvious fact?" *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting).

[3] See, *e. g., Alexander* v. *Louisiana*, 405 U. S. 625 (1972) (grand jury); *Whitus* v. *Georgia*, 385 U. S. 545 (1967) (petit jury); *Avery* v. *Georgia*, 345 U. S. 559 (1953) (petit jury).

[4] It is doubtful that many jurisdictions maintain comprehensive records of peremptory challenges, let alone information regarding the race of those individuals challenged. Defendants attempting to demonstrate the kind of systematic exclusion required by *Swain* have virtually always failed, see J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to

these reasons, some leading state courts have declined to follow *Swain* in interpreting state constitutional provisions. See *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1980); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979); *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978). Cf. *People* v. *Payne*, 106 Ill. App. 3d 1034, 436 N. E. 2d 1046 (1982).

I would grant certiorari to reexamine the standard set forth in *Swain*. In contrast to the defendant in *Swain*, petitioners have not relied upon the Equal Protection Clause in their challenge to the exclusion of potential Negro jurors. They rely instead on their Sixth Amendment right to be tried

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Representative Panels 156, and nn. 83–98 (1977) (listing more than 50 cases); Annot., 79 A. L. R. 3d 14, 56–73 (1977) (collecting federal and state cases), despite proof that unmistakeably creates an inference of racial discrimination. See, *e. g.*, *United States* v. *Carter*, 528 F. 2d 844, 848, and n. 3 (CA8 1975) (evidence showing that prosecutors used peremptory challenges to exclude 81% of Negroes available to serve on petit jurors in 15 criminal cases tried during 1974, and that in 7 of the trials the prosecutor excluded all available Negroes, held insufficient to establish claim under *Swain*), cert. denied, 425 U. S. 961 (1976); *United States* v. *Nelson*, 529 F. 2d 40, 43 (CA8 1976) (faced once again with prosecutor utilizing peremptory challenges to remove all Negroes in case involving Negro defendant, court expresses "concern" but merely warns that in future district judges will take "appropriate action" in exercise of their supervisory powers); *United States* v. *Pearson*, 448 F. 2d 1207, 1213–1218 (CA5 1971) (prosecutor's notes showing race of defendants, number of Negroes on the jury panel, and number of Negroes challenged during one week of trials supported "reasonable conclusion" that Government challenged as many Negroes as possible when the defendant was a Negro, but did not suffice under *Swain*); *United States* v. *Robinson*, 421 F. Supp. 467 (Conn. 1976), vacated *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977); *State* v. *Simpson*, 326 So. 2d 54 (Fla. App. 1976) (reversing trial court's conclusion of systematic exclusion); *Ridley* v. *State*, 475 S. W. 2d 769 (Tex. Crim. App. 1972) (holding that *Swain* standard was not satisfied by evidence that prosecutor had used seven peremptory challenges to remove Negroes from the panel, by testimony from local attorneys as to prosecutor's sytematic use of peremptory challenges in cases involving Negro defendants and white victims, and by an assistant district attorney's admission that it was his practice to do so).

by an impartial jury drawn from a fair cross section of the community. *Swain* was decided before this Court held that the Sixth Amendment applies to the States through the Fourteenth Amendment, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and well before this Court identified the contours of that right in *Taylor* v. *Lousiana*, 419 U. S. 522 (1975). It should be reconsidered in light of Sixth Amendment principles established by our recent cases.

In *Taylor* v. *Louisiana*, this Court explained that "[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community." *Id.*, at 530. We noted that the effect of excluding "'any large and identifiable segment of the community . . . is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" *Id.*, at 532, n. 12, quoting *Peters* v. *Kiff*, 407 U. S. 493, 503 (1972) (opinion of MARSHALL, J.). Accordingly, we accepted the "fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment," 419 U. S., at 530, and we specifically stated that "the exclusion of Negroes from jury service because of their race 'contravenes the very idea of a jury—"a body truly representative of the community" . . . .'" *Id.*, at 528 (quoting *Carter* v. *Jury Comm'n*, 396 U. S. 320, 330 (1970)).

The right to a jury drawn from a fair cross section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury. This Court has consistently struck down methods of jury selection that produce racially biased jury venires.[5] The very purpose of refusing to tolerate racial discrimination in the composition of the venire is to prevent the State's systematic exclusion of any racial group from juries. The desired interaction of a cross section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues. The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process. There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can then be struck because of their race by a prosecutor's use of peremptory challenges. Yet, given the normal allowance of such challenges,[6] a prosecutor who wishes to exclude all Negroes can normally do so. The effect of excluding minorities goes beyond the individual defendant, for such exclusion produces "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U. S. 187, 195 (1946).[7]

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[5] See *Peters* v. *Kiff*, 407 U. S. 493 (1972); *Sims* v. *Georgia*, 389 U. S. 404 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967); *Whitus* v. *Georgia*, *supra;* *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Avery* v. *Georgia*, *supra;* *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Hale* v. *Kentucky*, 303 U. S. 613 (1938); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935); *Norris* v. *Alabama*, 294

The right to be tried by a jury representative of a cross section of the community does not mean that each jury must

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U. S. 587 (1935); *Martin* v. *Texas*, 200 U. S. 316 (1906); *Neal* v. *Delaware*, 103 U. S. 370 (1881); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880).

[6] For example, in the federal system the prosecutor is entitled to 20 peremptory challenges in capital cases, 6 peremptory challenges if the offense is punishable by imprisonment for more than one year, and 3 if the offense is punishable by imprisonment of not more than one year or by fine or both. Fed. Rule Crim. Proc. 24(b).

[7] Of course, the State has an interest in exercising its peremptory challenges as it wishes. But while the peremptory challenge may be an important right of an accused, *Pointer* v. *United States*, 151 U. S. 396, 408 (1894), there is nothing in the Constitution that requires peremptory challenges for either the accused or the State, *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). When the representative cross-section requirement—"an essential component of the Sixth Amendment right to a jury trial," *Taylor* v. *Louisiana*, 419 U. S. 522, 528 (1975)—conflicts with what is at most a statutory right to exercise peremptory challenges, the latter must give way.

include constituents of every group in the population. The impracticality of such a formulation is obvious. But there is a serious question whether the right to an impartial jury permits the State to exclude members of a racial minority solely because of their race. When a prosecutor uses several peremptory challenges to exclude every potential Negro juror, there is strong circumstantial evidence that the exclusions are racially motivated and therefore in violation of the defendant's Sixth Amendment right. At the very least, a defendant should be able to state a cognizable claim without proof of absolute exclusion of every Negro in every case for several years, as required by *Swain.*

In California, for example, a defendant must make a timely objection and show from all the circumstances a strong likelihood that the prosecution is exercising its peremptory challenges because of race alone. If the trial judge finds a reasonable inference of exclusion based on race, the statutory provision that no reason need be given for a peremptory challenge gives way to the constitutional imperative and the prosecution must show some nonracial basis for the exercise of its challenges. The trial court then makes the ultimate determination as to whether the defendant has successfully demonstrated that the prosecution is using its peremptory challenges in a constitutionally impermissible manner. See *People* v. *Wheeler, supra.* Such a procedure is merely illustrative, but it appears to be quite workable. The California courts have indicated no difficulty in applying it. See, *e. g., People* v. *Johnson,* 22 Cal. 3d 296, 583 P. 2d 774 (1978); *People* v. *Allen,* 23 Cal. 3d 286, 590 P. 2d 30 (1979) (trial court errs in failing to require prosecution to demonstrate nonracial basis for exclusion); *People* v. *Rousseau,* 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1982) (trial court correctly concluded that defendant failed to establish prima facie case); *People* v. *Fuller,* 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982).

Accordingly, I would grant certiorari to consider whether petitioners' Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were violated by the prosecutors' use of peremptory challenges to exclude all Negroes from the juries in these three cases.[8] Sixth Amendment principles have evolved significantly since *Swain* was decided, and it is time to reexamine whether the rule announced in *Swain* under the Equal Protection Clause can be reconciled with the Sixth Amendment right of every defendant.[9]

No. 82–1646. ROLLS-ROYCE LTD. *v.* NALLS, ADMINISTRATOR FOR THE ESTATE OF ABRAHAM, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 226 U. S. App. D. C. 276, 702 F. 2d 255.

JUSTICE POWELL, dissenting.

I dissent from the denial of the petition for writ of certiorari for reasons similar to those stated by Judge Wilkey in his Statement as to Reasons for Voting for En Banc Consideration in the Court of Appeals. 226 U. S. App. D. C. 276, 702 F. 2d 255 (1983).

No. 82–6514. ZETTLEMOYER *v.* PENNSYLVANIA. Sup. Ct. Pa.; and

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[8] Because I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would in any event grant certiorari in No. 82–5910. In light of the special emphasis we have placed on providing an impartial jury in capital cases, see *Adams* v. *Texas*, 448 U. S. 38 (1980); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), review of the use of peremptory challenges in capital cases is particularly appropriate.

[9] As respondent in No. 82–1381, the State of New York has also requested that this Court grant the petition for writ of certiorari. The State concedes that the Court of Appeals' decision raises a significant and recurring question of law concerning race discrimination in the jury selection process. Brief for Respondent in Support of Petition 6–9. The State also notes the conflict among state-court decisions and contends that the conflict is likely to grow as a result of widespread litigation of this issue in numerous state courts. *Id.*, at 9–11.

No. 82–6556. GRETZLER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 82–6514, 500 Pa. 16, 454 A. 2d 937; No. 82–6556, 135 Ariz. 42, 659 P. 2d 1.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82–1061. BEGASSAT *v.* COSMOPOLITAN NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 13199, ET AL., 459 U. S. 1207;

No. 82–5950. SPENCER *v.* ISRAEL, WARDEN, 460 U. S. 1102;

No. 82–6273. BECKER *v.* ARCADIAN GARDENS, 460 U. S. 1090; and

No. 82–6369. PUCHALA ET AL. *v.* COINTELPRO ET AL., 460 U. S. 1092. Petitions for rehearing denied.

No. 82–701. NEW CASTLE AREA TRANSIT AUTHORITY *v.* KRAMER ET AL., 459 U. S. 1146. Motion for leave to file petition for rehearing and for other relief denied.

JUNE 3, 1983

Dismissal Under Rule 53

No. 82–6658. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 703 F. 2d 579.

BANKRUPTCY RULES

The Bankruptcy Rules were prescribed by the Supreme Court of the United States on April 25, 1983, pursuant to 28 U. S. C. § 2075, and were reported to the Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 974. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, these Rules do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such Rules.

For earlier publication of Bankruptcy Rules, see, *e. g.*, 425 U. S. 1003.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1983

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress rules to govern the practice and procedure in bankruptcy cases under Title 11, United States Code, which have been adopted by the Supreme Court pursuant to Title 28, United States Code, Section 2075.

These rules were previously submitted to the Court for its consideration by the Judicial Conference of the United States under the authority granted by Section 331 of Title 28, United States Code. Accompanying these new rules is an excerpt from the Report of the Judicial Conference of the United States, which contains Advisory Committee Notes and official forms approved by the Conference.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 25, 1983

ORDERED:

1. That the rules of procedure in bankruptcy cases, recommended by the Judicial Conference of the United States, and to be known as the Bankruptcy Rules, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the practice and procedure in cases under Title 11, United States Code, as hereinafter set forth:

[See *infra*, pp. 977–1093.]

2. That the aforementioned Bankruptcy Rules shall take effect on August 1, 1983, and shall be applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a pending proceeding would not be feasible or would work injustice, in which event the former procedure applies.

3. That the Bankruptcy Rules, heretofore prescribed by this Court, be, and they hereby are, superseded by the new rules, effective August 1, 1983.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit these new Bankruptcy Rules to the Congress in accordance with the provisions of Section 2075 of Title 28, United States Code.

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BANKRUPTCY RULES

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RULES OF PRACTICE AND PROCEDURE IN BANKRUPTCY

Rule 1001. Scope of rules and forms; short title.

The Bankruptcy Rules and Forms govern procedure in United States Bankruptcy Courts in cases under chapters 7, 9, 11 and 13 of title 11 of the United States Code. The rules shall be cited as the Bankruptcy Rules and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the expeditious and economical administration of every case under the Code and the just, speedy, and inexpensive determination of every proceeding therein.

PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

Rule 1002. Voluntary petition.

(a) Commencement.—A debtor's petition commencing a voluntary case shall be filed with the bankruptcy court and shall conform substantially to Official Form No. 1.

(b) Number of copies.

(1) Chapter 7 liquidation and Chapter 13 adjustment of debts of an individual with regular income.—An original and one copy of a petition requesting relief under chapter 7 or chapter 13 of the Code shall be filed, but additional copies may be required by local rule. If a stockbroker's petition for relief under subchapter III of chapter 7 is filed, an additional copy shall be filed and transmitted by the clerk to the Securities Investor Protection Corporation. If a commodity broker's petition for relief under subchapter IV of chapter 7 is filed, an additional copy shall be filed and transmitted by the clerk to the Commodity Futures Trading Commission.

(2) Chapter 9 adjustment of debts of a municipality and Chapter 11 reorganization.—An original and five copies of a petition requesting relief under chapter 9 or chapter 11 of

the Code shall be filed, but additional copies may be required by local rule. The clerk shall transmit one copy to the District Director of Internal Revenue for the district in which the case is filed, one copy of a chapter 9 petition to the Secretary of State of the state in which the debtor is located, two copies of a chapter 9 petition to the Securities and Exchange Commission and, if the debtor is a corporation, two copies of a chapter 11 petition to the Securities and Exchange Commission. If the petition requests relief for the reorganization of a railroad under subchapter IV of chapter 11 of the Code, two additional copies of the petition shall be filed, and the clerk shall transmit one copy to the Interstate Commerce Commission and one copy to the Secretary of Transportation.

Rule 1003. Involuntary petition; case ancillary to foreign proceeding.

(*a*) *Commencement.*—A petition commencing an involuntary case shall be filed with the bankruptcy court and shall conform substantially to Official Form No. 11.

(*b*) *Number of copies.*—The number and distribution of copies shall be as specified in Rule 1002.

(*c*) *Transferor or transferee of claim.*—A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. A person who has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.

(*d*) *Joinder of petitioners after filing.*—If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

(e) Case ancillary to foreign proceeding.

(1) Petition; number of copies.—An original and one copy of a petition commencing a case ancillary to a foreign proceeding shall be filed with the bankruptcy court.

(2) Service of petition and summons.—On the filing of a petition pursuant to the preceding paragraph, the clerk shall forthwith issue a summons for service on all parties against whom relief is sought pursuant to § 304(b) of the Code and on such other parties as the court may direct. Rule 1010 applies to the manner of service of the summons and petition.

(3) Responsive pleadings and motions.—Rule 1011(a), (b), (c) and (e) applies to responsive pleadings and motions.

(4) Contested petition.—Rule 1018 applies when a petition filed under this rule is contested.

Rule 1004. Partnership petition.

(a) Voluntary petition.—A voluntary petition may be filed on behalf of the partnership by one or more general partners if all general partners consent to the petition.

(b) Involuntary petition; notice and summons.—After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall cause forthwith a copy of the petition to be sent to or served on each general partner who is not a petitioner; and (2) the clerk shall issue forthwith a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.

Rule 1005. Caption of petition.

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the name, social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before filing the petition. If the petition is not filed by the debtor, it shall include all names known to petitioners used by the debtor.

Rule 1006. Filing fee.

(a) General requirement.—Every petition shall be accompanied by the prescribed filing fee except as provided in subdivision (b) of this rule.

(b) Payment of filing fee in installments.

(1) Application for permission to pay filing fee in installments.—A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that he is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) Action on application.—Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates thereof. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3) Postponement of attorney's fees.—The filing fee must be paid in full before the debtor may pay an attorney for services in connection with the case.

Rule 1007. Lists, schedules and statements; time limits.

(a) List of creditors and equity security holders.

(1) Voluntary case.—In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities or a Chapter 13 Statement.

(2) Involuntary case.—In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a

list containing the name and address of each creditor unless a schedule of liabilities has been filed.

(3) Equity security holders.—In a chapter 11 reorganization case, a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder, shall be filed by the debtor within 15 days after entry of the order for relief unless the court orders otherwise.

(4) Extension of time.—Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to any trustee, committee appointed under the Code, or other party as the court may direct.

(b) Schedules and statements required.—The debtor in a chapter 7 liquidation case or chapter 11 reorganization case shall file with the court schedules of assets and liabilities, a statement of financial affairs, and a statement of executory contracts, prepared as prescribed by Official Forms No. 6 and either No. 7 or No. 8, whichever is appropriate, unless the court orders otherwise. The debtor in a chapter 13 individual's debt adjustment case shall file with the court a Chapter 13 Statement conforming to Official Form No. 10 and, if the debtor is engaged in business, a statement of financial affairs prepared as prescribed by Official Form No. 8.

(c) Time limits.—The schedule and statements, if not previously filed in a pending case, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e) and (h) of this rule. In an involuntary case the schedules and statements shall be filed by the debtor within 15 days after entry of the order for relief. In a case converted from chapter 11 or chapter 13 to a chapter 7 case, the list of all the debtor's creditors, a schedule of assets and liabilities, a statement of financial affairs and a statement of executory contracts shall be filed by the debtor or other person directed by the court, within 15 days after the entry of the order of

conversion. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to any committee, trustee, examiner or other party as the court may direct.

(d) List of 20 largest creditors in Chapter 9 municipality case or Chapter 11 reorganization case.—In addition the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by Official Form No. 9. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code.

(e) List in Chapter 9 municipality cases.—The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file with the court a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.

(f) Number of copies.—The number of copies of the schedules, statements and lists shall correspond to the number of copies of the petition required by Rules 1002 and 1003.

(g) Partnership and partners.—The general partners of a debtor partnership shall prepare and file the schedules of the assets and liabilities, statement of financial affairs, and statement of executory contracts of the partnership. The court may order any general partner to file a statement of personal assets and liabilities with the court within such time as the court may fix.

(h) Interests acquired or arising after petition.—Within ten days after the information comes to the debtor's knowledge or within such further time as the court may allow, the debtor in a chapter 7 liquidation case, chapter 11 reorganization case, or chapter 13 individual debt adjustment case shall file a supplemental schedule with respect to any property that the debtor acquires or becomes entitled to acquire within 180 days after the date of the filing of the petition (1) by bequest, devise or inheritance; (2) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or (3) as a beneficiary of a life insurance policy or of a death benefit plan. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case before the duty is or can be performed, except that the schedule need not be filed in a chapter 11 or chapter 13 case with respect to property acquired after entry of the order confirming the plan.

(i) Disclosure of list of security holders.—After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.

(j) Impounding of lists.—On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.

(k) Preparation of list, schedules, or statements on default of debtor.—If a list, schedule, or statement is not pre-

pared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.

Rule 1008. Verification of petitions and accompanying papers.

All petitions, lists, schedules, statements of financial affairs, statements of executory contracts, Chapter 13 Statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U. S. C. § 1746.

Rule 1009. Amendments of voluntary petitions, lists, schedules and statements of financial affairs.

A voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or Chapter 13 Statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, the court may order any voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or Chapter 13 Statement to be amended and the clerk shall give notice of the amendment to entities designated by the court. The amendment shall be filed in the same number as required of the original.

Rule 1010. Service of involuntary petition and summons.

On the filing of an involuntary petition, the clerk shall issue forthwith a summons for service on the debtor. The summons shall conform to Official Form No. 13 and a copy shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order the summons and petition to be served by mailing copies to the debtor's last known address, and by at least one publication in the manner and form directed by the court. The summons and petition may be served on the debtor anywhere. Rule 7004(f) and Rule 4(g) and (h) F. R. Civ. P. apply when service is made or attempted under this rule.

Rule 1011. Responsive pleading or motion in involuntary cases.

(a) Who may contest petition.—The debtor named in an involuntary petition may contest the petition. In the case of a petition against a partnership under Rule 1004(b), a nonpetitioning general partner, or alleged general partner, may contest the petition.

(b) Defenses and objections; when presented.—Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F. R. Civ. P. and shall be filed and served within 20 days after service of summons, except that if service is made by publication on a debtor or partner not residing or found within the state in which the bankruptcy court sits, the court shall prescribe the time for filing and serving the response.

(c) Effect of motion.—Service of a motion under Rule 12(b) F. R. Civ. P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F. R. Civ. P.

(d) Claims against petitioners.—A claim against a petitioning creditor may not be asserted in the answer except for the purpose of defeating the petition.

(e) Other pleadings.—No other pleadings shall be permitted, except that the court may order a reply to an answer and prescribe the time for filing and service.

Rule 1012. Examination of debtor, including discovery, on issue of nonpayment of debts in involuntary cases.

(a) Discovery.—When a petition commencing an involuntary case under § 303 of the Code alleges that the debtor is generally not paying its debts as they become due, and the debtor denies the allegation, discovery may be in accordance with Rules 26–37, F. R. Civ. P.

(b) Sanctions.—If the debtor fails to appear, produce records, or submit to examination or deposition, the court may enter an order for relief or other appropriate order, in addition to the sanctions available under Rule 37 F. R. Civ. P.

(c) Other procedures.—The examination or discovery provided in this rule does not preclude the procedures available under Rule 2004.

Rule 1013. Hearing and disposition of petition in involuntary cases.

(a) Contested petition.—The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter other appropriate orders.

(b) Default.—If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief prayed for in the petition.

(c) Order for relief.—An order for relief shall conform substantially to Official Form No. 14.

Rule 1014. Change of venue.

(a) Transfer of cases.

(1) Cases filed in proper district.—If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners and to other persons as directed by the court, the case may be transferred to any other district if the court determines that the transfer is for the convenience of the parties and witnesses in the interest of justice.

(2) Cases filed in improper district.—If a petition is filed in an improper district, on timely motion of a party in interest and after hearing on notice to the petitioners and to other persons as directed by the court, the case may be retained or transferred to any other district if the court determines that the retention or transfer is for the convenience of the parties and witnesses in the interest of justice. Notwithstanding

the foregoing, if no objection is raised, the court may, without a hearing, retain a case filed in an improper district.

(b) Procedure when petitions involving the same debtor or related debtors are filed in different courts.—If petitions commencing cases under the Code are filed in different districts by or against (1) the same debtor, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the court in which the first petition is filed and after hearing on notice to the petitioners and other persons as directed by the court, the court may determine, for the convenience of the parties and witnesses, in the interest of justice the court or courts in which the case or cases should proceed. Except as otherwise ordered by the court in which the first petition is filed, the proceedings on the other petitions shall be stayed by the courts in which the petitions have been filed until the determination is made. The courts in which petitions have been filed shall act in accordance with the determination.

Rule 1015. Consolidation or joint administration of cases pending in same court.

(a) Cases involving same debtor.—If two or more petitions are pending in the same court by or against the same debtor, the court may order consolidation of the cases.

(b) Cases involving two or more related debtors.—If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest.

(c) Expediting and protective orders.—When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting

the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.

Rule 1016. Death or insanity of debtor.

Death or insanity of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred. If a reorganization or individual's debt adjustment case is pending under chapter 11 or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

Rule 1017. Dismissal of case; suspension.

(a) Voluntary dismissal; dismissal for want of prosecution.—Except as provided in § 1307(b) of the Code, a petition shall not be dismissed on motion of the petitioner or for want of prosecution or other cause or by consent of the parties prior to a hearing on notice to all creditors as provided in Rule 2002(a). For such notice, the debtor shall file a list of all creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the preparing and filing by the debtor or other person.

(b) Dismissal for failure to pay filing fee.

(1) For failure to pay any installment of the filing fee the court may dismiss the petition after hearing on notice to the debtor and the trustee.

(2) If the petition is dismissed or the case closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors ap-

pearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 2002.

(c) Suspension.—A petition shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to a hearing on notice as provided in Rule 2002(a).

(d) Procedure for dismissal or conversion.—A proceeding to dismiss a case or convert a case to another chapter is governed by Rule 9014.

Rule 1018. Contested involuntary petitions; proceedings to vacate order for relief; applicability of rules in Part VII governing adversary proceedings.

The following rules in Part VII apply in all proceedings relating to a contested involuntary petition and in all proceedings to vacate an order for relief: Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056, and 7062, except as otherwise provided in Part I of these rules and unless the court otherwise directs. The court may direct that other rules in Part VII shall also apply. For the purposes of this rule a reference in the Part VII rules to adversary proceedings shall be read as a reference to proceedings relating to a contested involuntary petition, or contested ancillary petition, or proceedings to vacate an order for relief. Reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

Rule 1019. Conversion of Chapter 11 reorganization case or Chapter 13 individual's debt adjustment case to Chapter 7 liquidation case.

When a chapter 11 or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) Filing of lists, inventories, schedules, statements.—Lists, inventories, schedules, statements of financial affairs, and statements of executory contracts theretofore filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of

the entry of the order directing that the case continue under chapter 7.

(2) Notice of order of conversion.—Within 20 days after entry of the order converting the case to a chapter 7 case, notice of the order shall be given to all creditors in the manner provided by Rule 2002 and shall be included in the notice of the meeting of creditors.

(3) Reconversion to Chapter 7.—When a chapter 7 case had been converted to a chapter 11 or chapter 13 case and thereafter reconverted to a chapter 7 case, if the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt expired in the original chapter 7 case, the time shall not be revived or extended except as provided in Rule 4004 or 4007.

(4) Claims filed in superseded case.—All claims filed in the superseded case shall be deemed filed in the chapter 7 case.

(5) Turnover of records and property.—After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11 or chapter 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and property of the estate in his possession or control.

(6) Filing final report and schedule of postpetition debts.—Each debtor in possession or trustee in the superseded case shall file with the court a final report and account within 30 days following the entry of the order of conversion, unless the court directs otherwise. The report shall include a schedule of unpaid debts incurred after commencement of the chapter 11 or chapter 13 case. If the conversion order is entered after confirmation of a plan, the debtor shall file with the court (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts entered

into or assumed after the filing of the original petition but before entry of the conversion order.

(7) Filing of postpetition claims; notice.—On the filing of the schedule of unpaid debts, the court shall order that written notice be given to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed within 60 days from the entry of the order, pursuant to Rule 3001(a)–(d). The court shall fix the time for filing claims arising from debts not so scheduled or arising from rejection of executory contracts under §§ 348(c) and 365(d) of the Code.

(8) Extension of time to file claims against surplus.—Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (7) of this rule, and notice shall be given as provided in Rule 2002.

PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 2001. Appointment of interim trustee before order for relief in a Chapter 7 liquidation case.

(a) Appointment.—At any time following the commencement of an involuntary liquidation case and before an order for relief, the court on written motion of a party in interest may appoint an interim trustee under § 303(g) of the Code. The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors and other parties in interest as the court may designate.

(b) Bond of movant.—An interim trustee may not be appointed under this rule unless the movant furnishes a bond in an amount approved by the court, conditioned to indemnify the debtor for costs, attorney's fee, expenses, and damages allowable under § 303(i) of the Code.

(c) Order of appointment.—The order appointing the interim trustee shall state why the appointment is necessary and shall specify the trustee's duties.

(d) Turnover and report.—Following qualification of the trustee selected under § 702 of the Code, the interim trustee, unless otherwise ordered, shall (1) forthwith turn over to the trustee all the records and property of the estate in possession or subject to control of the interim trustee and, (2) within 30 days thereafter file a final report and account.

Rule 2002. Notices to creditors, equity security holders, and United States.

(a) Twenty-day notices to parties in interest.—Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of (1) the meeting of creditors pursuant to § 341 of the Code; (2) a proposed use, sale, or lease of property other than in the ordinary course of business unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6); (5) in a chapter 7 liquidation and a chapter 11 reorganization case, the hearing on the dismissal or conversion of a case to another chapter; (6) the time fixed to accept or reject a proposed modification of a plan; (7) hearings on all applications for compensation or reimbursement of expenses totalling in excess of $100; and (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

(b) Twenty-five-day notices to parties in interest.—Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of (1) the time fixed for filing objections to and the hearing to consider ap-

proval of a disclosure statement; and (2) the time fixed for filing objections to and the hearing to consider confirmation of a plan.

(c) Content of notice.

(1) Proposed use, sale, or lease of property.—Subject to Rule 6004 the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property.

(2) Notice of hearing on compensation.—The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision (a)(7) of this rule shall identify the applicant and the amounts requested.

(d) Notice to equity security holders.—In a chapter 11 reorganization case, unless otherwise ordered by the court, the clerk, or some other person as the court may direct, shall in the manner and form directed by the court give notice to all equity security holders of (1) the order for relief; (2) any meeting of equity security holders ordered by the court pursuant to § 341 of the Code; (3) the hearing on the dismissal or conversion of a case to another chapter; (4) the time fixed for filing objections to and the hearing to consider approval of a disclosure statement; (5) the time fixed for filing objections to and the hearing to consider confirmation of a plan; and (6) the time fixed to accept or reject a proposed modification of a plan.

(e) Notice of no dividend.—In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.

(f) Other notices.—Except as provided in subdivision (k) of this rule, the clerk shall give the debtor, all creditors and in-

denture trustees notice by mail of (1) the order for relief; (2) dismissal of the case; (3) the time allowed for filing claims pursuant to Rule 3002; (4) the entry of an order directing that the case be converted to a case under a different chapter; (5) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to § 727 of the Code as provided in Rule 4004; (6) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007; (7) the order of discharge as provided in Rule 4004(g); (8) the waiver denial, or revocation of a discharge as provided in Rule 4006; (9) entry of an order confirming a chapter 9 or 11 plan; and (10) a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $250. Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).

(g) Addresses of notices.—All notices required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as he or his authorized agent may direct in a request filed with the court; otherwise, to the address shown in the list of creditors or the schedule whichever is filed later, but if a different address is stated in a proof of claim duly filed, that address shall be used.

(h) Notices to creditors whose claims are filed.—In a chapter 7 case, the court may, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, direct that all notices required by subdivision (a) of this rule, except clause (4) thereof, be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(6).

(i) Notices to committees.—Copies of all notices required to be mailed under this rule shall be mailed to the committees appointed pursuant to the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (7) of this rule be mailed only to the committees or to their authorized agents and to the creditors and equity security hold-

ers who file with the court a request that all notices be mailed to them.

(j) Notices to the United States.—Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case to the Securities and Exchange Commission at Washington, D. C., and at any other place the Commission designates in writing filed with the court if the Commission has filed a notice of appearance in the case or has made a request in writing filed with the court; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D. C.; (3) in a chapter 11 case to the District Director of Internal Revenue for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D. C.

(k) Notice by publication.—The court may order notice by publication if it finds that notice by mail as provided in this rule is impracticable or that it is desirable to supplement the notice.

(l) Orders designating matter of notices.—The court may from time to time enter orders designating the matters in respect to which, the person to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.

(m) Caption.—The caption of every notice given under this rule shall comply with Rule 1005.

Rule 2003. Meeting of creditors or equity security holders.

(a) Date and place.—The court shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the court may set a later time for the meet-

ing. The meeting may be held at a regular place for holding court or at any other place designated by the court within the district convenient for the parties in interest.

(b) Order of meeting.

(1) Meeting of creditors.—The clerk shall preside at the meeting of creditors unless (1) the court designates a different person, or (2) the creditors who may vote for a trustee under § 702(a) of the Code and who hold a majority in amount of claims that vote designate a presiding officer. In a chapter 11 reorganization case, if a chairman has been selected by a creditors' committee appointed pursuant to § 1102(a)(1), the chairman or his designee shall preside. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a trustee or of a creditors' committee. The presiding officer shall have the authority to administer oaths. When a trustee is elected, the creditors may recommend the amount of the trustee's bond to be fixed by the court.

(2) Meeting of equity security holders.—If the court orders a meeting of equity security holders pursuant to § 341(b) of the Code, the clerk shall preside unless the holders of equity security interests present at the meeting who hold a majority in amount of the interests at the meeting designate a presiding officer.

(3) Right to vote.—In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, he has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. If the court orders an election of a separate trustee for a general partner's estate under Rule 2009(e)(1), a creditor of the partnership may file a proof of claim or writing evidencing a right to vote for that trustee notwithstanding that a trustee for the partnership has previously qualified. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may, after such notice and hearing as it may direct, tempo-

rarily allow it for that purpose in an amount that seems proper to the court.

(c) Minutes and record of meeting.—Minutes of the meeting of creditors or equity security holders shall be prepared by the presiding officer. Any examination under oath shall be recorded verbatim by electronic sound recording equipment or other means of recording.

(d) Report to the court.—The presiding officer shall transmit to the court the name and address of any person elected trustee or a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting, the interim trustee shall serve as trustee in the case.

(e) Adjournment.—The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time without further written notice.

Rule 2004. Examination.

(a) Examination on motion.—On motion of any party in interest, the court may order the examination of any person.

(b) Scope of examination.—The examination of any person under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In an individual's debt adjustment case under chapter 13 or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any

other matter relevant to the case or to the formulation of a plan.

(c) Compelling attendance and production of documentary evidence.—The attendance of any person for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

(d) Time and place of examination of debtor.—The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) Mileage.—A person other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

Rule 2005. Apprehension and removal of debtor to compel attendance for examination.

(a) Order to compel attendance for examination.—On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left his residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal, or some other officer authorized by law, an order directing the officer to bring the debtor before the court with-

out unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

(b) Removal.—Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the following rules:

(1) If taken at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest federal magistrate, bankruptcy judge, or district judge. If, after hearing, the magistrate, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate, bankruptcy judge, or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring prompt appearance before the court which issued the order to compel the attendance.

(c) Conditions of release.—In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U. S. C., § 3146(a) and (b).

Rule 2006. Solicitation and voting of proxies in Chapter 7 liquidation cases.

(a) Applicability.—This rule applies only in a liquidation case pending under chapter 7 of the Code.

(b) Definitions.

(1) Proxy.—A proxy is a written power of attorney authorizing any person to vote the claim or otherwise act as the

owner's attorney in fact in connection with the administration of the estate.

(2) Solicitation of proxy.—The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent the owner, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the debtor.

(c) Authorized solicitation.

(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least five days notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition.

(2) A proxy may be solicited only in writing.

(d) Solicitation not authorized.—This rule does not permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any person not qualified to vote under § 702(a) of the Code; (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.

(e) Data required from holders of multiple proxies.—At any time before the voting commences at any meeting of creditors pursuant to Rule 2003, or at any other time as the

court may direct, a holder of two or more proxies shall file with the clerk a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy, including:

(1) a copy of the solicitation;

(2) identification of the solicitor, the forwarder, if he is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the debtor and with each other. If the solicitor, forwarder, or proxyholder is an association, there shall also be included a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. If the solicitor, forwarder, or proxyholder is a committee of creditors, the statement shall also set forth the date and place the committee was organized, that the committee was organized in accordance with clause (B) or (C) of paragraph (c)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;

(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;

(4) a statement as to whether there is any agreement and, if so, the particulars thereof, between the proxyholder and any other person for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any person, other than a member or regular associate of his law firm, which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(5) if the proxy was solicited by a person other than the proxyholder, or forwarded to the holder by a person who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the solicitor or forwarder

that no consideration has been paid or promised by him for the proxy, and whether there is any agreement, and, if so, the particulars thereof, between the solicitor or forwarder and any other person for the payment of any consideration in connection with voting the proxy, or for sharing compensation with any person other than a member or regular associate of his law firm which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on his claim.

(f) Enforcement of restrictions on solicitation.—On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other appropriate action.

Rule 2007. Appointment of creditors' committee organized before order for relief.

(a) Appointment.—In a chapter 9 municipality or chapter 11 reorganization case, on application of a party in interest and after notice as the court may direct, the court may appoint as the committee of unsecured creditors required by § 1102(a) of the Code, members of a committee selected before the order for relief in accordance with subdivision (b) of this rule.

(b) Selection of members of committee.—The court may find that a committee selected by unsecured creditors before the order for relief in a chapter 9 or chapter 11 case of the Code satisfies the requirements of § 1102(b)(1) of the Code if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over $1,000 or the 100 unsecured creditors having the largest claims had at least five days notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection;

(2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the lists and statements required by subdivision (e) thereof have been filed with the court; and

(3) the organization of the committee was in all other respects fair and proper.

Rule 2008. Notice to trustee of selection.

The clerk shall immediately notify the trustee of his selection, how he may qualify and, if applicable, the amount of the bond. The trustee shall notify the court in writing of the acceptance or rejection of the office within five days after receipt of notice of selection.

Rule 2009. Trustees for estates when joint administration ordered.

(a) Election of single trustee for estates being jointly administered.—If the court orders a joint administration of two or more estates pursuant to Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered.

(b) Right of creditors to elect separate trustee.—Notwithstanding entry of an order for joint administration pursuant to Rule 1015(b) the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code.

(c) Appointment of trustees for estates being jointly administered.

(1) Chapter 7 liquidation cases.—The court may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.

(2) Chapter 11 reorganization cases.—If a trustee is ordered, the court may appoint one or more trustees for estates being jointly administered in chapter 11 cases.

(3) Chapter 13 individual's debt adjustment cases.—The court may appoint one or more trustees for estates being jointly administered in chapter 13 cases.

(d) Potential conflicts of interest.—On a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee, the court shall order separate trustees for estates being jointly administered.

(e) Trustees for partnership and partners' individual estates.—Notwithstanding the foregoing provisions of this rule, the trustee of a partnership estate shall also be the trustee of the individual estate of any general partner if the estates are being jointly administered unless the court, for cause shown, either (1) permits the creditors of a general partner to elect a separate trustee or (2) appoints a separate trustee for the individual estate.

(f) Separate accounts.—The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate.

Rule 2010. Qualification by trustee; proceeding on bond.

(a) Blanket bond.—The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.

(b) Qualification by filing acceptance.—A trustee for whom a blanket bond has been filed shall qualify by filing an acceptance of the election or appointment.

(c) Evidence of qualification.—A certified copy of the order approving the trustee's bond or of the acceptance filed under subdivision (b) of this rule shall constitute conclusive evidence of qualification.

(d) Proceeding on bond.—A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition.

Rule 2011. Evidence of debtor in possession.

Whenever evidence is required that a debtor is a debtor in possession, the clerk may so certify and the certificate shall constitute conclusive evidence of that fact.

Rule 2012. Substitution of successor trustee; accounting.

When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code:

(1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and

(2) within the time fixed by the court, the successor trustee shall prepare and file with the court an accounting of the prior administration of the estate.

Rule 2013. Limitation on appointment or employment of trustees, examiners, appraisers and auctioneers.

(a) Limitation on appointments.—Appointments of trustees and examiners and employment of appraisers and auctioneers shall be made so that the annual aggregate compensation of any person shall not be disproportionate or excessive, giving proper regard to geographic constraints.

(b) Record to be kept.—The clerk shall maintain a public record listing fees paid from estates (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professional persons employed by trustees, and (2) to examiners appointed by the court. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee paid. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge.

(c) Summary of record.—At the close of each annual period, the clerk shall prepare a summary of the public record

by individual or firm name, to reflect total fees paid during the preceding year. The summary shall be open to examination by the public without charge.

Rule 2014. Employment of professional persons.

(a) Application for and order of employment.—An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professional persons pursuant to § 327 or § 1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for his selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.

(b) Services rendered by member or associate or firm of attorneys or accountants.—If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2015. Duty of trustee or debtor in possession to keep records, make reports, and give notice of case.

(a) Trustee or debtor in possession.—A trustee or debtor in possession shall (1) in a chapter 7 liquidation and a chapter 11 reorganization case and if the court so directs within 30 days after entering on his duties file a complete inventory of the property of the debtor unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file the reports and summaries required by § 704(7) of the Code within the times fixed by the court and which shall include a statement, if payments are made to employees, of the amounts of deductions

for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited; (4) as soon as possible after the commencement of the case, give notice of the case to every person known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; (5) within 30 days after the date of the order confirming a plan or within such other time as the court may fix, file a report with the court concerning the action taken by the trustee or debtor in possession and the progress made in the consummation of the plan and file further reports as the court may direct until the plan has been consummated; (6) after consummation of a plan, file an application for a final decree showing that the plan has been consummated, and the names and addresses, if known, of the holders of claims or interests which have not been surrendered or released in accordance with the provisions of the plan and the nature and amounts of claims or interests, and other facts as may be necessary to enable the court to pass on the provisions to be included in the final decree.

(b) Chapter 13 trustee and debtor.

(1) Business cases.—In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (1)–(4) of subdivision (a) of this rule.

(2) Nonbusiness cases.—In a chapter 13 individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.

(c) Transmission of reports.—In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be mailed to the creditors, equity security holders, and indenture trust-

ees. The court may also direct the publication of summaries of any such reports.

Rule 2016. Compensation for services rendered and reimbursement of expenses.

(a) Application for compensation or reimbursement.—A person seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person.

(b) Disclosure of compensation paid or promised to attorney for debtor.—Every attorney for a debtor, whether or not the attorney applies for compensation, shall file with the court on or before the first date set for the meeting of creditors, or at another time as the court may direct, the statement required by § 329 of the Code which shall also set forth whether the attorney has shared or agreed to share the compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for

the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required.

Rule 2017. Examination of debtor's transactions with his attorney.

(a) Payment or transfer to attorney before commencement of case.—On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor, to an attorney for services rendered or to be rendered is excessive.

(b) Payment or transfer to attorney after commencement of case.—On motion by the debtor or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after the commencement of a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

Rule 2018. Intervention; right to be heard.

(a) Permissive intervention.—In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

(b) Intervention by attorney general of a state.—In a chapter 7, 11, or 13 case, the Attorney General of a State may appear and be heard on behalf of consumer creditors if the court determines the appearance is in the public interest, but the Attorney General may not appeal from any judgment, order, or decree in the case.

(c) Chapter 9 municipality case.—The Secretary of the Treasury may, or if requested by the court shall, intervene in a chapter 9 case. Representatives of the state in which the debtor is located may intervene in a chapter 9 case with respect to matters specified by the court.

(d) Labor unions.—In a chapter 9 or 11 case, a labor unio
or employees' association, representative of employees c
the debtor, shall have the right to be heard on the economi
soundness of a plan affecting the interests of the employee
but it may not appeal from any judgment, order, or decree i
the case unless otherwise permitted by law.

(e) Service on entities covered by this rule.—The cour
may enter orders governing the service of notice and paper
on entities permitted to intervene or be heard pursuant t
this rule.

Rule 2019. Representation of creditors and equity securit
holders in Chapter 9 municipality and Chapter 11 re
organization cases.

(a) Data required.—In a chapter 9 municipality or chapte
11 reorganization case, except with respect to a committe
appointed pursuant to § 1102 of the Code, every person c
committee representing more than one creditor or equit
security holder and, unless otherwise directed by the cour
every indenture trustee, shall file a verified statement wit
the clerk setting forth (1) the name and address of the cred
tor or equity security holder; (2) the nature and amount of th
claim or interest and the time of acquisition thereof unless
is alleged to have been acquired more than one year prior t
the filing of the petition; (3) a recital of the pertinent fac
and circumstances in connection with the employment of th
person or indenture trustee, and, in the case of a committe
the name or names of the person or persons at whose i
stance, directly or indirectly, the employment was arrange
or the committee was organized or agreed to act; and (4) wit
reference to the time of the employment of the person, th
organization or formation of the committee, or the appea
ance in the case of any indenture trustee, the amounts c
claims or interests owned by the person, the members c
the committee or the indenture trustee, the times whe
acquired, the amounts paid therefor, and any sales or othe
disposition thereof. The statement shall include a copy c
the instrument, if any, whereby the person, committee, or i
denture trustee is empowered to act on behalf of creditors c

equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) Failure to comply; effect.—On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any person, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that person, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any person or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by a person or committee who has not complied with this rule or with § 1125(b) of the Code.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3001. Proof of claim.

(a) Form and content.—A proof of claim is a written statement setting forth a creditor's claim. A proof of claim for wages, salary, or commissions shall conform substantially to Official Form No. 20 or No. 21; any other proof of claim shall conform substantially to Official Form No. 19.

(b) Who may execute.—A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(c) Claim based on a writing.—When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(d) Evidence of perfection of security interest.—If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(e) Transferred claim.

(1) Unconditional transfer before proof filed.—If a claim other than one based on a bond or debenture has been unconditionally transferred before proof of the claim has been filed, the proof of claim may be filed only by the transferee. If the claim has been transferred after the filing of the petition, the proof of claim shall be supported by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor or (B) a statement of the transferee setting forth the consideration for the transfer and why the transferee is unable to obtain the statement from the transferor.

(2) Unconditional transfer after proof filed.—If a claim other than one based on a bond or debenture has been unconditionally transferred after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the original claimant by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed with the clerk within 20 days of the mailing of the notice or within any additional time allowed by the court. If the court finds, after a hearing on notice, that the claim has been unconditionally transferred, it shall enter an order substituting the transferee for the original claimant, otherwise the court shall enter such order as may be appropriate.

(3) Transfer of claim for security before proof filed.—If a claim other than one based on a bond or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If the claim was transferred after the filing of the petition, the proof shall also be supported by (A) a statement of the transferor acknowledging the transfer and stating the consider-

ation therefor, or (B) a statement of the transferee setting forth the consideration for the transfer and why the transferee is unable to obtain the statement from the transferor. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. After a hearing on notice, the court shall enter such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(4) Transfer of claim for security after proof filed.—If a claim other than one based on a bond or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the original claimant by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed with the clerk within 20 days of the mailing of the notice or within any additional time allowed by the court. After a hearing on notice, the court shall enter such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(5) Service of objection; notice of hearing.—A copy of an objection to the evidence of transfer filed pursuant to paragraph (2) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferee at least 30 days prior to the hearing.

(f) Evidentiary effect.—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Rule 3002. Filing proof of claim or interest.

(a) Necessity for filing.—An unsecured creditor or an equity security holder must file a proof of claim or interest in

accordance with this rule for the claim or interest to be allowed, except as provided in Rules 3003, 3004 and 3005.

(b) Place of filing.—A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) Time for filing.—In a chapter 7 liquidation or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of a person or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that person or denies or avoids the person's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract of the debtor may be filed within the time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may

grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed.

Rule 3003. Filing proof of claim or equity security interest in Chapter 9 municipality or Chapter 11 reorganization cases.

(a) Applicability of rule.—This rule applies in chapter 9 and 11 cases.

(b) Schedule of liabilities and list of equity security holders.

(1) Schedule of liabilities.—The schedule of liabilities filed pursuant to § 521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.

(2) List of equity security holders.—The list of equity security holders filed pursuant to Rule 1007(a)(3) shall constitute prima facie evidence of the validity and amount of the equity security interests and it shall not be necessary for the holders of such interests to file a proof of interest.

(c) Filing proof of claim.

(1) Who may file.—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who must file.—Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing.—The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

(4) Effect of filing claim.—A proof of claim or interest executed and filed in accordance with this subdivision shall

supersede any scheduling of that claim or interest pursuant to § 521(1) of the Code.

(5) Filing by indenture trustee.—An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.

(d) Proof of right to record status.—For the purposes of Rules 3017, 3018 and 3021 and for receiving notices, a person who is not the record holder of a security may file a statement setting forth facts which entitle that person to be treated as the record holder. An objection to the statement may be filed by any party in interest.

Rule 3004. Filing of claims by debtor or trustee.

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. The creditor may thereafter file a proof of claim pursuant to Rule 3002 or Rule 3003, which proof when filed shall supersede the proof filed by the debtor or trustee.

Rule 3005. Filing of claim, acceptance, or rejection by guarantor, surety, indorser, or other codebtor.

(a) Filing of claim.—If a creditor has not filed a proof of claim pursuant to Rule 3002(c) or 3003(c), one who is or may be liable with the debtor to that creditor, or who has secured that creditor, may, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c) whichever is applicable, execute and file a proof of claim in the name of the creditor, if known, or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. The creditor may thereafter file a proof of claim pursuant to Rule 3002(c) or 3003(c) and it shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(b) Filing of acceptance or rejection; substitution of creditor.—One who has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in his own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice with the court prior to confirmation of a plan of his intention to act in his own behalf, the creditor shall be substituted for the obligor with respect to that claim.

Rule 3006. Withdrawal of claim or acceptance or rejection of plan.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee selected pursuant to §§705(a) or 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

Rule 3007. Objections to claims.

An objection to the allowance of a claim shall be in writing and filed with the court. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Rule 3008. Reconsideration of claims.

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

Rule 3009. Declaration and payment of dividends in Chapter 7 liquidation cases.

In chapter 7 cases, dividends to creditors shall be paid as promptly as practicable in the amounts and at the times as ordered by the court. Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other person and shall be mailed to the other person.

Rule 3010. Small dividends and payments in Chapter 7 liquidation and Chapter 13 individual's debt adjustment cases.

(a) Chapter 7 cases.—In a chapter 7 case no dividend in an amount less than $5 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Any such dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds as provided in § 347 of the Code.

(b) Chapter 13 cases.—In a chapter 13 case no payment in an amount less than $15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates $15. Any funds remaining shall be distributed with the final payment.

Rule 3011. Unclaimed funds in Chapter 7 liquidation and Chapter 13 individual's debt adjustment cases.

The trustee shall file with the clerk a list of all known names and addresses of the persons and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.

Rule 3012. Valuation of security.

The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other person as the court may direct.

Rule 3013. Classification of claims and interests.

For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§ 1122 and 1322(b)(1) of the Code.

Rule 3014. Election pursuant to § 1111(b) by secured creditor in Chapter 9 municipality and Chapter 11 reorganization cases.

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

Rule 3015. Filing of plan in Chapter 13 individual's debt adjustment cases.

The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter and such time shall not be further extended except for cause shown and on notice as the court may direct. Every proposed plan and any modification thereof shall be dated. The clerk shall include the plan or a summary of the plan with each notice of the hearing on confirmation pursuant to Rule 2002(b). If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.

Rule 3016. Filing of plan and disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(a) Time for filing plan.—A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code, may file a plan at any time before the conclusion of the hearing on the disclosure statement or thereafter with leave of court.

(b) Identification of plan.—Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the person or persons submitting or filing it.

(c) Disclosure statement.—In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

Rule 3017. Court consideration of disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(a) Hearing on disclosure statement and objections thereto.—Following the filing of a disclosure statement as provided in Rule 3016(c), the court shall hold a hearing on not less than 25 days notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider such statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, trustee, any committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and such other entity as may be

designated by the court, at any time prior to approval of the disclosure statement or by such earlier date as the court may fix.

(b) Determination on disclosure statement.—Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) Dates fixed for voting on plan and confirmation.—On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) Transmission and notice to creditors and equity security holders.—On approval of a disclosure statement, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; (4) notice of any date fixed for the hearing on confirmation; and (5) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, a form of ballot conforming to Official Form No. 30 shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered.

Rule 3018. Acceptance or rejection of plans.

(a) Persons entitled to accept or reject plan; time for acceptance or rejection.—A plan may be accepted or rejected

by the following entities within the time fixed by the court pursuant to Rule 3017: (1) any creditor whose claim is deemed allowed pursuant to § 502 of the Code or has been allowed by the court; (2) subject to subdivision (b) of this rule, any creditor who is a security holder of record at the date the order approving the disclosure statement is entered whose claim has not been disallowed; and, (3) an equity security holder of record at the date the order approving the disclosure statement is entered whose interest has not been disallowed. For cause shown and within the time fixed for acceptance or rejection of a plan, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

(b) Acceptances or rejections obtained before petition.— Acceptances or rejections of a plan may be obtained before the commencement of a case under the Code and may be filed with the court on behalf of (1) the holder of a claim or interest which is deemed allowed pursuant to § 502 of the Code or allowed by the court; (2) a creditor who is a security holder of record at the date specified in the solicitation for the purposes of such solicitation and whose claim has not been disallowed; and (3) an equity security holder of record at the date specified in the solicitation for the purposes of such solicitation and whose interest has not been disallowed. A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that the plan was not transmitted to substantially all impaired creditors and impaired equity security holders, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that the solicitation was not in compliance with § 1126(b) of the Code.

(c) Form of acceptance or rejection.—An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or his authorized agent, and conform to Official Form No. 30. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate his preferences among the plans so accepted.

(d) Acceptance or rejection by partially secured creditor.—A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.

Rule 3019. Modification of accepted plan before confirmation.

After a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code and any other person designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Rule 3020. Deposit; confirmation of plan.

(a) Deposit.—In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(b) Objections to and hearing on confirmation.

(1) Objections.—Objections to confirmation of the plan shall be filed with the court and served on the debtor, the

trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) Hearing.—The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may find, without receiving evidence, that the plan has been proposed in good faith and not by any means forbidden by law.

(c) Order of confirmation.—The order of confirmation shall conform to Official Form No. 31 and notice of entry thereof shall be mailed promptly by the clerk to the debtor, creditors, equity security holders and other parties in interest.

(d) Retained power.—Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

Rule 3021. Distribution under plan.

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security interests have not been disallowed and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) and which have been allowed.

Rule 3022. Final decree.

After an estate is fully administered, including distribution of any deposit required by the plan, the court shall enter a final decree (1) discharging any trustee if not previously discharged and cancelling his bond; (2) making provision by way of injunction or otherwise as may be equitable; and (3) closing the case.

PART IV. THE DEBTOR: DUTIES AND BENEFITS

Rule 4001. Relief from automatic stay; use of cash collateral.

(a) Request for relief from stay or to use cash collateral.—A request for relief from an automatic stay provided by the

Code or for the use of cash collateral pursuant to § 363(c)(2) shall be made in accordance with Rule 9014.

(b) Final hearing on stay.—The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing is commenced pursuant to § 362(e)(2) unless within that time the court denies the motion for relief from the stay.

(c) Ex parte relief from stay.—Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (1) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or his attorney can be heard in opposition, and (2) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such person or persons a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.

Rule 4002. Duties of debtor.

In addition to performing other duties prescribed by the Code and rules, the debtor shall (1) attend and submit to an examination at the times ordered by the court; (2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness; (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007; and (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate.

Rule 4003. Exemptions.

(a) Claim of exemptions.—A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objections to claim of exemptions.—The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and his attorney.

(c) Burden of proof.—In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

(d) Avoidance by debtor of transfer of exempt property.—A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014.

Rule 4004. Grant or denial of discharge.

(a) Time for filing complaint objecting to discharge; notice of time fixed.—In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirmation. The court shall give not less than 25 days notice of the time so fixed to all creditors in the manner provided in Rule 2002, and to the trustee and his attorney.

(b) Extension of time.—On motion of any party in interest, after hearing on notice, the court may for cause extend the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.

(c) Grant of discharge.—In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, or (3) the debtor has filed a waiver under § 727(a)(10) of the Code. Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

(d) Applicability of rules in Part VII.—A proceeding commenced by a complaint objecting to discharge is governed by the rules in Part VII.

(e) Order of discharge.—An order of discharge shall conform to Official Form No. 27.

(f) Registration in other districts.—An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of the bankruptcy court of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.

(g) Notice of discharge.—The clerk shall promptly mail a copy of the final order of discharge to the persons specified in subdivision (a) of this rule.

Rule 4005. Burden of proof in objecting to discharge.

At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving his objection.

Rule 4006. Notice of no discharge.

If an order is entered denying or revoking a discharge or if a waiver of discharge is filed, after the order becomes final or the waiver is filed the clerk shall promptly give notice thereof to all creditors in the manner provided in Rule 2002.

Rule 4007. Determination of dischargeability of a debt.

(a) Persons entitled to file complaint.—A debtor or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt.

(b) Time for commencing proceeding other than under § 523(c) of the code.—A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

(c) Time for filing complaint under § 523(c) in Chapter 7 liquidation and Chapter 11 reorganization cases; notice of time fixed.—A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

(d) Time for filing complaint under § 523(c) in Chapter 13 individual's debt adjustment cases; notice of time fixed.—On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 523(c) and shall give not less than 30 days notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest after hearing on notice the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

(e) Applicability of rules in Part VII.—A proceeding commenced by a complaint filed under this rule is governed by the rules in Part VII.

Rule 4008. Discharge and reaffirmation hearing.

Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court shall hold a hearing as provided in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

PART V. BANKRUPTCY COURTS AND CLERKS

Rule 5001. Bankruptcy courts and clerks' offices.

(a) Bankruptcy courts always open.—Bankruptcy courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.

(b) Trials and hearings; orders in chambers.—All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a bankruptcy judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(c) Clerk's office.—The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and the legal holidays listed in Rule 6(a) F. R. Civ. P. A local rule or order may provide that the clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than those listed in Rule 77(c) F. R. Civ. P.

Rule 5002. Prohibited appointments.

No person may be appointed as a trustee or examiner or be employed as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to § 327 or § 1103 of the Code if (1) the person is a relative of any judge of the court making the appointment or approving the employment or (2) the person is or has been so connected with any judge of the court making the appointment or approving the employment as to render such appointment or employment improper. Whenever under this rule a person is ineligible for appointment or employment, the person's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for appointment or employment.

Rule 5003. Records kept by the clerk.

(a) Bankruptcy dockets.—The clerk shall keep bankruptcy dockets recording all judgments and orders and the activity in each case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

(b) Claims register.—The clerk shall keep in a claims register a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors.

(c) Judgments.—The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a correct copy of every final judgment or order affecting title to or lien on real property or for the recovery of money or property, and any other order which the court may direct to be kept.

(d) Index of cases; certificate of search.—The clerk shall keep suitable indices of all cases filed under the Code as prescribed by the Director of the Administrative Office of the United States Courts. On request, the clerk shall make a search of any index and papers in his custody and certify whether a case has been filed in or transferred to the court or a discharge entered in its records.

(e) Other books and records of the clerk.—The clerk shall also keep such other books and records as may be required by the Director of the Administrative Office of the United States Courts.

Rule 5004. Disqualification.

(a) Disqualification of judge.—When a judge is disqualified from acting by 28 U. S. C. § 455, he shall disqualify him-

self from presiding over the adversary proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, he shall disqualify himself from presiding over the case.

(b) Disqualification of judge from allowing compensation.—A judge shall disqualify himself from allowing compensation to a person who is a relative or with whom he is so associated as to render it improper for him to authorize such compensation.

Rule 5005. Filing of papers.

(a) Filing.—The petition, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U. S. C. § 1473, shall be filed with the clerk of the court in which the case under the Code is pending. The judge of that court may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the clerk.

(b) Error in filing.—A paper intended to be filed but erroneously delivered to the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. In the interest of justice, the court may order that the paper shall be deemed filed as of the date of its original delivery.

Rule 5006. Certification of copies of papers.

The clerk shall issue a certified copy of the record of any proceeding in a case under the Code or of any paper filed with the court on payment of any prescribed fee.

Rule 5007. Record of proceedings and transcripts.

(a) Filing of record or transcript.—The reporter or operator of a recording device shall certify the original notes of testimony, tape recording, or other original record of the proceeding and promptly file them with the clerk. The person

preparing any transcript shall promptly file a certified copy with the clerk.

(b) Transcript fees.—The fees for copies of transcripts shall be charged at rates prescribed by the Judicial Conference of the United States. No fee may be charged for the certified copy filed with the clerk for the records of the court.

(c) Admissibility of record in evidence.—A certified sound recording or a transcript of a proceeding shall be admissible as prima facie evidence to establish the record.

Rule 5008. Funds of the estate.

(a) Court approval required.—A deposit or investment for which a bond or deposit of securities is required under § 345(b) of the Code shall not be made until the court, on motion with such notice as the court directs, approves the bond or the deposit of securities.

(b) Report of deposit or investment.—Promptly after making the initial deposit or investment of the estate's funds and thereafter as the court may direct, the trustee shall file a report which identifies the depository or describes the investment and states the amount of any deposit or investment and whether any portion is insured or guaranteed by the United States or a department, agency, or instrumentality of the United States, or backed by the full faith and credit of the United States.

(c) Deposit of securities; agreement.—Securities accepted for deposit in lieu of a surety on a depository bond shall be deposited in the custody of the Federal Reserve Bank or branch thereof designated by the court or in the custody of such other person as the court may direct. The securities shall be deposited conditioned on proper accounting for all money deposited or invested and for any return on any such money, prompt repayment of such money and return thereon, and faithful performance of the duties as a depository or entity with whom an investment is made. The entity depositing securities shall execute an agreement for the deposit of securities in favor of the United States which incor-

porates the foregoing conditions. Securities subject to such an agreement shall be subject to the order of the court.

(d) Action on bond or agreement for deposit of securities.—Proceedings on a bond given pursuant to § 345(b) of the Code or on an agreement for deposit of securities required by subdivision (c) of this rule shall be in the name of the United States for the use of the estate or any person injured by a breach of the condition.

(e) Prohibition of deposits when adequacy of security doubtful.—No trustee or other person shall deposit or invest funds received or held by him as a fiduciary under the Code if there is reasonable cause to believe that the bond or the security therefor or the deposited securities are or may be inadequate in view of existing and expected deposits or investments.

(f) Reports required.—Depositories and entitites with whom deposits or investments are made shall file reports as prescribed by regulations of the Director of the Administrative Office of the United States Courts.

(g) Deficiency in amount of bond or deposited securities.—Whenever the bond and any deposited securities do not or will not constitute adequate security because of existing and expected deposits or investments, the court shall require the depository or entity with whom an investment is made to increase the amount of the bond or the deposited securities within a fixed time. If within the time fixed the depository or entity with whom an investment is made fails to increase the amount of the bond or the deposited securities to an amount adequate for existing and expected deposits or investments, the court shall order immediate payment of all money on deposit or invested with it, with all interest payable thereon.

(h) Relief from liability on bond.—A surety on a bond may move to be relieved from liability with respect to any subsequent default. If after hearing on notice to the depository or entity with whom the investment is made, to other sureties, to trustees and to other representatives of estates having money of the estate protected by the bond, the court

determines that the motion may be granted without injury to any party in interest, the surety shall be relieved after a new bond or other appropriate security is submitted and approved.

(i) Combining of funds for deposit.—The court may authorize the deposit or investment of funds from more than one estate in a single account or investment instrument. The trustee shall maintain records identifying separately the money of each estate. The court shall require that a statement of account be filed at least quarterly.

Rule 5009. Closing cases.

When an estate has been fully administered and the court has discharged the trustee, the case shall be closed.

Rule 5010. Reopening cases.

A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6001. Burden of proof as to validity of postpetition transfer.

Any entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof.

Rule 6002. Accounting by prior custodian of property of the estate.

(a) Accounting required.—Any custodian required by the Code to deliver property in his possession or control to the trustee, shall promptly file a report and account with the bankruptcy court with respect to the property of the estate and his administration thereof.

(b) Examination of administration.—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after hearing on notice the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

Rule 6003. Disbursement of money of the estate.

Disbursement of estate funds shall be by check unless another method is approved by the court. On motion of a party in interest, the court may require countersignatures except that signature by the judge shall not be permitted.

Rule 6004. Use, sale, or lease of property.

(a) Notice of proposed use, sale, or lease of property.—Notice of a proposed use, sale, or lease of property other than in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c), and (i).

(b) Objection to proposal.—Except as provided in subdivision (c) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court.

(c) Sale of property under $2,500.—Notwithstanding subdivision (a) of this rule, when all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court.

(d) Hearing.—If a timely objection is made pursuant to subdivision (b) or (c) of the rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.

(e) Conduct of sale not in the ordinary course of business.

(1) Public or private sale.—All sales not in the ordinary course of business may be private or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed with the clerk on completion of a sale. If the property is sold by an auctioneer, he shall file the statement

and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement.

(2) Execution of instruments.—After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.

Rule 6005. Appraisers and auctioneers.

The order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of his compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment.

Rule 6006. Assumption, rejection and assignment of executory contracts.

(a) Proceeding to assume, reject, or assign.—A proceeding to assume, reject, or assign an executory contract, including an unexpired lease, other than as part of a plan is governed by Rule 9014.

(b) Proceeding to require trustee to act.—A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014.

(c) Hearing.—When a motion is made pursuant to subdivision (a) or (b) of this rule, the court shall set a hearing on notice to the other party to the contract and to other parties in interest as the court may direct.

Rule 6007. Abandonment or disposition of property.

(a) Notice of proposed abandonment or disposition; objections.—Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to all creditors, indenture trustees and committees appointed or elected pursuant to the Code. An objection may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court.

(b) Motion by party in interest.—A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(c) Hearing.—If a timely objection is made as prescribed by subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the persons as the court may direct.

Rule 6008. Redemption of property from lien or sale.

On motion by the debtor, trustee, or debtor in possession and after hearing on notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.

Rule 6009. Prosecution and defense of proceedings by trustee or debtor in possession.

With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

Rule 6010. Proceeding to avoid indemnifying lien or transfer to surety.

If a lien voidable under § 547 of the Code has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, nonexempt property of the debtor, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by the rules in Part VII. If an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, on motion by any party in interest after notice and hearing the court shall ascertain the value of such property or lien. If the value is less than the amount for which the property or lien is indemnity, the surety may elect to retain the property or lien on payment of the value so ascertained to the trustee or debtor in possession, within the time fixed by the court.

PART VII. ADVERSARY PROCEEDINGS

Rule 7001. Scope of rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding in a bankruptcy court (1) to recover money or property, except a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed to a bankruptcy court.

Rule 7002. References to Federal Rules of Civil Procedure.

Whenever a Federal Rule of Civil Procedure applicable to adversary proceedings makes reference to another Federal Rule of Civil Procedure, the reference shall be read as a reference to the Federal Rule of Civil Procedure as modified in this Part VII.

Rule 7003. Commencement of adversary proceeding.

Rule 3 F. R. Civ. P. applies in adversary proceedings.

Rule 7004. Process; service of summons, complaint.

(a) Summons; service; proof of service.—Rule 4(a), (b), (d), (e) and (g)–(i) F. R. Civ. P. applies in adversary proceedings.

Personal service pursuant to Rule 4(d) F. R. Civ. P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(b) Service by first class mail.—In addition to the methods of service authorized by Rule 4(d) F. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at his dwelling house or usual place of abode or at the place where he regularly conducts his business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint to the United States attorney for the dis-

trict in which the action is brought and also the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to such officer or agency.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the person upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such defendant in the court of general jurisidiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at his dwelling house or usual place of abode or at the place where he regularly carries on his business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to

the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in writing filed with the court and, if the debtor is represented by an attorney, to the attorney at his post-office address.

(c) Service by publication.—If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(d) or (i) F. R. Civ. P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the party's last known address and by at least one publication in such manner and form as the court may direct.

(d) Nationwide service of process.—The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(e) Service on debtor and others in foreign country.—The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(d)(7) or (e).

(f) Summons: time limit for service.—If service is made pursuant to Rule 4(d)(1)–(7) it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

Rule 7005. Service and filing of pleadings and other papers.

Rule 5 F. R. Civ. P. applies in adversary proceedings.

Rule 7007. Pleadings allowed.

Rule 7 F. R. Civ. P. applies in adversary proceedings.

Rule 7008. General rules of pleading.

(a) Applicability of Rule 8 F. R. Civ. P.—Rule 8 F. R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending.

(b) Attorney's fees.—A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.

Rule 7009. Pleading special matters.

Rule 9 F. R. Civ. P. applies in adversary proceedings.

Rule 7010. Form of pleadings.

Rule 10 F. R. Civ. P. applies in adversary proceedings, except that the caption of each pleading in such a proceeding shall conform substantially to Official Form No. 34.

Rule 7012. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings.

(a) When presented.—If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 20 days after service. The plaintiff

shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of a more definite statement.

(b) Applicability of Rule 12(b)–(h) F. R. Civ. P.—Rule 12(b)–(h) F. R. Civ. P. applies in adversary proceedings.

Rule 7013. Counterclaim and cross-claim.

Rule 13 F. R. Civ. P. applies in adversary proceedings, except that a party sued by a trustee or debtor in possession need not state as a counterclaim any claim which he has against the debtor, his property, or the estate, unless the claim arose after the entry of an order for relief. A trustee or debtor in possession who fails to plead a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, may by leave of court amend the pleading, or commence a new adversary proceeding or separate action.

Rule 7014. Third-party practice.

Rule 14 F. R. Civ. P. applies in adversary proceedings.

Rule 7015. Amended and supplemental pleadings.

Rule 15 F. R. Civ. P. applies in adversary proceedings.

Rule 7016. Pre-trial procedure; formulating issues.

Rule 16 F. R. Civ. P. applies in adversary proceedings.

Rule 7017. Parties plaintiff and defendant; capacity.

Rule 17 F. R. Civ. P. applies in adversary proceedings, except as provided in Rules 2010(d) and 5008(d).

Rule 7018. Joinder of claims and remedies.

Rule 18 F. R. Civ. P. applies in adversary proceedings.

Rule 7019. Joinder of persons needed for just determination.

Rule 19 F. R. Civ. P. applies in adversary proceedings, except that (1) if a person joined as a party raises the defense that the bankruptcy court lacks jurisdiction over the subject matter and the defense is sustained, the court shall dismiss such person from the adversary proceedings and (2) if a person joined as a party properly and timely raises the defense of improper venue, the court shall determine, as provided in 28 U. S. C. § 1477, whether that part of the proceeding involving the joined party shall be retained or transferred to another district, or whether the entire adversary proceeding shall be transferred to another district.

Rule 7020. Permissive joinder of parties.

Rule 20 F. R. Civ. P. applies in adversary proceedings.

Rule 7021. Misjoinder and non-joinder of parties.

Rule 21 F. R. Civ. P. applies in adversary proceedings.

Rule 7022. Interpleader.

Rule 22(1) F. R. Civ. P. applies in adversary proceedings.

Rule 7023. Class proceedings.

Rule 23 F. R. Civ. P. applies in adversary proceedings.

Rule 7023.1. Derivative proceedings by shareholders.

Rule 23.1 F. R. Civ. P. applies in adversary proceedings.

Rule 7023.2. Adversary proceedings relating to unincorporated associations.

Rule 23.2 F. R. Civ. P. applies in adversary proceedings.

Rule 7024. Intervention.

Rule 24 F. R. Civ. P. applies in adversary proceedings.

Rule 7025. Substitution of parties.

Subject to the provisions of Rule 2012, Rule 25 F. R. Civ. P. applies in adversary proceedings.

Rule 7026. General provisions governing discovery.

Rule 26 F. R. Civ. P. applies in adversary proceedings.

Rule 7027. Depositions before adversary proceedings or pending appeal.

Rule 27 F. R. Civ. P. applies to adversary proceedings.

Rule 7028. Persons before whom depositions may be taken.

Rule 28 F. R. Civ. P. applies in adversary proceedings.

Rule 7029. Stipulations regarding discovery procedure.

Rule 29 F. R. Civ. P. applies in adversary proceedings.

Rule 7030. Depositions upon oral examination.

Rule 30 F. R. Civ. P. applies in adversary proceedings.

Rule 7031. Deposition upon written questions.

Rule 31 F. R. Civ. P. applies in adversary proceedings.

Rule 7032. Use of depositions in adversary proceedings.

Rule 32 F. R. Civ. P. applies in adversary proceedings.

Rule 7033. Interrogatories to parties.

Rule 33 F. R. Civ. P. applies in adversary proceedings.

Rule 7034. Production of documents and things and entry upon land for inspection and other purposes.

Rule 34 F. R. Civ. P. applies in adversary proceedings.

Rule 7035. Physical and mental examination of persons.

Rule 35 F. R. Civ. P. applies in adversary proceedings.

Rule 7036. Requests for admission.

Rule 36 F. R. Civ. P. applies in adversary proceedings.

Rule 7037. Failure to make discovery: sanctions.

Rule 37 F. R. Civ. P. applies in adversary proceedings.

Rule 7040. Assignment of cases for trial.

Rule 40 F. R. Civ. P. applies in adversary proceedings.

Rule 7041. Dismissal of adversary proceedings.

Rule 41 F. R. Civ. P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee and only on order of the court containing terms and conditions which the court deems proper.

Rule 7042. Consolidation of adversary proceedings; separate trials.

Rule 42 F. R. Civ. P. applies in adversary proceedings.

Rule 7052. Findings by the court.

Rule 52 F. R. Civ. P. applies in adversary proceedings.

Rule 7054. Judgments; costs.

(a) Judgments.—Rule 54(a)–(c) F. R. Civ. P. applies in adversary proceedings.

(b) Costs.—The court may allow costs to the prevailing party except when a statute of the United States or these

rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice; on motion served within five days thereafter, the action of the clerk may be reviewed by the court.

Rule 7055. Default.

Rule 55 F. R. Civ. P. applies in adversary proceedings.

Rule 7056. Summary judgment.

Rule 56 F. R. Civ. P. applies in adversary proceedings.

Rule 7062. Stay of proceedings to enforce a judgment.

Rule 62 F. R. Civ. P. applies in adversary proceedings except that an order granting relief from an automatic stay provided by § 362, § 922, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or property of the estate under § 363, and an order authorizing the trustee to obtain credit pursuant to § 364 shall be additional exceptions to Rule 62(a).

Rule 7064. Seizure of person or property.

Rule 64 F. R. Civ. P. applies in adversary proceedings.

Rule 7065. Injunctions.

Rule 65 F. R. Civ. P. applies in adversary proceedings, except that a temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor in possession without compliance with Rule 65(c).

Rule 7067. Deposit in court.

Rule 67 F. R. Civ. P. applies in adversary proceedings.

Rule 7068. Offer of judgment.

Rule 68 F. R. Civ. P. applies in adversary proceedings.

Rule 7069. Execution.

Rule 69 F. R. Civ. P. applies in adversary proceedings.

Rule 7070. Judgment for specific acts; vesting title.

Rule 70 F. R. Civ. P. applies in adversary proceedings and the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is subject to the jurisdiction of the bankruptcy court.

Rule 7071. Process in behalf of and against persons not parties.

Rule 71 F. R. Civ. P. applies in adversary proceedings.

Rule 7087. Transfer of adversary proceeding.

On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U. S. C. § 1475 and § 1477, except as provided in Rule 7019(2).

PART VIII. APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL

Rule 8001. Manner of taking appeal; voluntary dismissal; effect of appeal to court of appeals.

(a) Appeal as of right; how taken.—An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk of the bankruptcy court within the time allowed by Rule 8002. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to Official Form No. 35, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of

appeal to enable the clerk of the bankruptcy court to comply promptly with Rule 8004.

(b) Appeal by leave; how taken.—An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U. S. C. § 1334(b) or § 1482(b) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

(c) Voluntary dismissal.

(1) Before docketing.—If an appeal has not been docketed, the appeal may be dismissed by the bankruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(2) After docketing.—If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court or bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

(d) Effect of taking a direct appeal to the court of appeals.

(1) Dismissal of pending appeal to the district court or the bankruptcy appellate panel.—On the filing of a notice of a direct appeal by agreement of the parties to the court of appeals under 28 U. S. C. § 1293(b), the clerk of the bankruptcy court shall enter an order vacating any prior notice of appeal to the district court or bankruptcy appellate panel from the same judgment, order, or decree of the bankruptcy court and, if the appeal to the district court or bankruptcy appellate panel has not been docketed, the clerk of the bankruptcy court shall enter an order dismissing the appeal. If the appeal to the district court or bankruptcy appellate panel has been docketed, the clerk of the bankruptcy court shall forward to the clerk of the district court or the clerk of the bankruptcy appellate panel a copy of the order vacating the notice

of appeal and on receipt thereof the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal.

(2) Dismissal of subsequent appeal to the district court or the bankruptcy appellate panel.—If a notice of direct appeal under 28 U. S. C. § 1293(b) is filed and thereafter a notice of appeal to the district court or bankruptcy appellate panel from the same judgment, order, or decree is filed, the clerk of the bankruptcy court shall enter an order dismissing the appeal to the district court or the bankruptcy appellate panel.

(3) Appeal after dismissal of direct appeal by court of appeals.—If the direct appeal under 28 U. S. C. § 1293(b) is dismissed by the court of appeals on the ground that the judgment, order, or decree appealed from is not final, the appellant or cross appellant may, within 10 days of entry of the order of the dismissal in the court of appeals, file a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

Rule 8002. Time for filing notice of appeal.

(a) Ten-day period.—The notice of appeal shall be filed with the clerk of the bankruptcy court within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of that court or the clerk of the appellate panel shall note thereon the date on which it was received and transmit it to the clerk of the bankruptcy court and it shall be deemed filed in the bankruptcy court on the date so noted.

(b) Effect of motion on time for appeal.—If a timely motion is filed in the bankruptcy court by any party: (1) for judgment notwithstanding the verdict under Rule 9015; (2) under

Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 9023 to alter or amend the judgment; or (4) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

(c) Extension of time for appeal.—The bankruptcy court may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

Rule 8003. Leave to appeal.

(a) Content of motion; answer.—A motion for leave to appeal under 28 U. S. C. § 1334(b) or § 1482(b) shall contain: (1) a statement of the facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of those questions and of the relief sought; (3) a statement of the reasons why an appeal should be granted; and (4) a copy of the judgment, order, or decree complained of and of any opinion or memorandum relating thereto. Within 10 days after service of the motion an adverse party may file with the clerk of the bankruptcy court an answer in opposition.

(b) Transmittal; determination of motion.—The clerk of the bankruptcy court shall transmit the notice of appeal, the

motion for leave to appeal and any answer thereto to the clerk of the district court or the clerk of the bankruptcy appellate panel as soon as all parties have filed answers or the time for filing an answer has expired. The motion and answer shall be submitted without oral argument unless otherwise ordered.

(c) Appeal improperly taken regarded as a motion for leave to appeal.—If a required motion for leave to appeal is not filed, but a notice of appeal is timely filed, the district court or bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing shall consider the notice of appeal as a motion for leave to appeal. Unless an order directing that a motion for leave to appeal be filed provides otherwise, the motion shall be filed within 10 days of entry of the order.

Rule 8004. Service of the notice of appeal.

The clerk of the bankruptcy court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant or, if a party is not represented by counsel, to the party at his last known address. Failure to serve notice shall not affect the validity of the appeal. The clerk shall note on each copy served the date of the filing of the notice of appeal and shall note in the docket the names of the parties to whom copies are mailed and the date of the mailing.

Rule 8005. Stay pending appeal.

A motion for a stay of the judgment, order, or decree of a bankruptcy court, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance in the bankruptcy court. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy court may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by the bankruptcy court, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy court. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

Rule 8006. Record and issues on appeal.

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) or entry of an order granting leave to appeal the appellant shall file with the clerk of the bankruptcy court and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within seven days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within seven days of service of the statement of the cross appellant, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. If the record designated by any party includes a transcript of any proceeding or a part thereof, he shall immediately after filing the designation deliver to the reporter and file with the clerk of the bankruptcy court a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8007. Completion and transmission of the record; docketing of the appeal.

(a) Duty of reporter to prepare and file transcript.—On receipt of a request for a transcript, the reporter shall acknowledge on the request the date it was received and the date on which he expects to have the transcript completed and shall transmit the request, so endorsed, to the clerk of the bankruptcy court. On completion of the transcript the reporter shall file it with the clerk of the bankruptcy court. If the transcript cannot be completed within 30 days of receipt of the request the reporter shall seek an extension of time from the clerk of the bankruptcy court and the action of the clerk shall be entered in the docket and the parties notified. If the reporter does not file the transcript within the time allowed, the clerk of the bankruptcy court shall notify the bankruptcy judge.

(b) Duty of clerk to transmit record; copies of record; docketing of appeal.—When the record is complete for purposes of appeal, the clerk of the bankruptcy court shall transmit it forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. If the record is to be retained in the bankruptcy court as provided in subdivision (c) of this rule, the clerk shall transmit the notice of appeal and the judgment, order, or decree appealed from, and any opinion, findings of fact and conclusions of law of the court. On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter the appeal in the docket and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed. If the bankruptcy appellate panel directs that additional copies of the record be furnished, the clerk of the bankruptcy appellate panel shall

notify the appellant and, if the appellant fails to provide the copies, the clerk shall prepare the copies at the expense of the appellant.

(c) Retention of record in bankruptcy court.—Any part of the record on appeal may be retained in the bankruptcy court if the parties to the appeal so stipulate or the bankruptcy court so orders. The record on appeal for all purposes shall nevertheless be the record as designated under Rule 8006. When the bankruptcy court has ordered retention, the parties shall provide to the clerk of the bankruptcy court copies of any papers retained and the clerk shall transmit those copies to the district court or the bankruptcy appellate panel. If papers have been retained pursuant to a stipulation of the parties, on request of a party to the stipulation the clerk of the bankruptcy court shall transmit the papers so requested to the district court or the bankruptcy appellate panel. On order of the district court or the bankruptcy appellate panel the bankruptcy clerk shall transmit any retained papers to the clerk of that court or the clerk of the appellate panel.

(d) Record for preliminary hearing.—If prior to the time the record is transmitted a party moves in the district court or before the bankruptcy appellate panel for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the bankruptcy court at the request of any party to the appeal shall transmit to the clerk of the district court or the clerk of the bankruptcy appellate panel the parts of the original record as any party to the appeal shall designate.

Rule 8008. Filing and service.

(a) Filing.—Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the

district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished.

(b) Service of all papers required.—Copies of all papers filed by any party and not required by these rules to be served by the clerk of the district court or the clerk of the bankruptcy appellate panel shall, at or before the time of filing, be served by the party or a person acting for him on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel.

(c) Manner of service.—Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service.—Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require the acknowledgment or proof of service to be filed promptly thereafter.

Rule 8009. Briefs and appendix; filing and service.

(a) Briefs.—Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file his brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file his brief within 15 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, and if the ap-

pellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(b) Appendix to brief.—If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with his brief excerpts of the record as an appendix, which shall include the following:

(1) The complaint and answer or other equivalent pleadings;

(2) Any pretrial order;

(3) The judgment, order, or decree from which the appeal is taken;

(4) Any other orders relevant to the appeal;

(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;

(6) Any motion and response on which the court rendered decision;

(7) The notice of appeal; and

(8) The relevant entries in the bankruptcy court docket.

An appellee may also serve and file an appendix which contains material required to be included by the appellant but omitted by appellant.

Rule 8010. Form of briefs; length.

(a) Form of briefs.—Unless the district court or the bankruptcy appellate panel by local rule otherwise provides, the form of brief shall be as follows:

(1) Brief of the appellant.—The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(A) A table of contents, with page references, and a table of cases alphabetically arranged, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(B) A statement of the basis of appellate jurisdiction.

(C) A statement of the issues presented and the applicable standard of appellate review.

(D) A statement of the case.—The statement shall first indicate briefly the nature of the case, the course of the proceedings, and the disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(E) An argument.—The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(F) A short conclusion stating the precise relief sought.

(2) Brief of the appellee.—The brief of the appellee shall conform to the requirements of paragraph (1)(A)–(E) of this subdivision, except that a statement of the basis of appellate jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(b) Reproduction of statutes, rules, regulations, or similar material.—If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar material, relevant parts thereof shall be reproduced in the brief or in an addendum or they may be supplied to the court in pamphlet form.

(c) Length of briefs.—Unless the district court or the bankruptcy appellate panel by local rule or order otherwise provides, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material.

Rule 8011. Motions.

(a) Content of motions; response; reply.—A request for an order or other relief shall be made by filing with the clerk of the district court or the clerk of the bankruptcy appellate panel a motion for such order or relief with proof of service on

all other parties to the appeal. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order within seven days after service of the motion, but the district court or the bankruptcy appellate panel may shorten or extend the time for responding to any motion.

(b) Determination of motions for procedural orders.—Notwithstanding subdivision (a) of this rule, motions for procedural orders, including any motion under Rule 9006, may be acted on at any time, without awaiting a response thereto and without hearing. Any party adversely affected by such action may move for reconsideration, vacation, or modification of the action.

(c) Determination of all motions.—All motions will be decided without oral argument unless the court orders otherwise. A motion for a stay, or for other emergency relief may be denied if not presented promptly.

(d) Emergency motions.—Whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court or bankruptcy appellate panel to receive and consider a response, the word "Emergency" shall precede the title of the motion. The motion shall be accompanied by an affidavit setting forth the nature of the emergency. The motion shall state whether all grounds advanced in support thereof were submitted to the bankruptcy judge and, if any grounds relied on were not submitted, why the motion should not be remanded to the bankruptcy judge for reconsideration. The motion shall include the office addresses and telephone numbers of moving and opposing counsel and shall be served pursuant to Rule 8008. Prior to filing the motion, the movant shall make every practicable effort to notify opposing counsel in time for counsel to respond to the motion. The affidavit accompanying the mo-

tion shall also state when and how opposing counsel was notified or if opposing counsel was not notified why it was not practicable to do so.

(e) Power of a single judge to entertain motions.—A single judge of a bankruptcy appellate panel may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise decide an appeal or a motion for leave to appeal. The action of a single judge may be reviewed by the panel.

Rule 8012. Oral argument.

Oral argument shall be allowed in all cases unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs and record, or appendix to the brief, that oral argument is not needed. Any party shall have an opportunity to file a statement setting forth the reason why oral argument should be allowed.

Oral argument will not be allowed if (1) the appeal is frivolous; (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Rule 8013. Disposition of appeal; weight accorded bankruptcy judge's findings of fact.

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Rule 8014. Costs.

Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court. Costs incurred in the production of copies of briefs, the appendices, and the record and in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the notice of appeal shall be taxed by the clerk of the bankruptcy court as costs of the appeal in favor of the party entitled to costs under this rule.

Rule 8015. Motion for rehearing.

Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel.

Rule 8016. Duties of clerk of district court and bankruptcy appellate panel.

(a) Entry of judgment.—The clerk of the district court or the clerk of the bankruptcy appellate panel shall prepare, sign and enter the judgment following receipt of the opinion of the court or the appellate panel or, if there is no opinion, following the instruction of the court or the appellate panel. The notation of a judgment in the docket constitutes entry of judgment.

(b) Notice of orders or judgments; return of record.—Immediately on the entry of a judgment or order the clerk of the district court or the clerk of the bankruptcy appellate panel shall transmit a notice of the entry to each party to the appeal and to the clerk of the bankruptcy court, together with a copy of any opinion respecting the judgment or order, and shall make a note of the transmission in the docket. Original papers transmitted as the record on appeal shall be returned to the bankruptcy court on disposition of the appeal.

Rule 8017. Stay of judgment of district court or bankruptcy appellate panel.

(a) Automatic stay of judgment on appeal.—Judgments of the district court or the bankruptcy appellate panel are stayed until the expiration of 10 days after entry, unless otherwise ordered by the district court or the bankruptcy appellate panel.

(b) Stay pending appeal to the court of appeals.—On motion and notice to the parties to the appeal, the district court or the bankruptcy appellate panel may stay its judgment pending an appeal to the court of appeals. The stay shall not extend beyond 30 days after the entry of the judgment of the district court or the bankruptcy appellate panel unless the period is extended for cause shown. If before the expiration of a stay entered pursuant to this subdivision there is an appeal to the court of appeals by the party who obtained the stay, the stay shall continue until final disposition by the court of appeals. A bond or other security may be required as a condition to the grant or continuation of a stay of the judgment. A bond or other security may be required if a trustee obtains a stay but a bond or security shall not be required if a stay is obtained by the United States or an officer or agency thereof or at the direction of any department of the Government of the United States.

(c) Power of court of appeals not limited.—This rule does not limit the power of a court of appeals or any judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Rule 8018. Rules by circuit councils and district courts.

Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U. S. C. § 160 and the district courts in districts in which an appellate panel has not been authorized may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from the bankruptcy courts to the respective bankruptcy appellate panel or district court, not inconsistent with the rules of this Part VIII. Copies of rules and amendments so made shall on promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each district court and the clerk of each bankruptcy appellate panel shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of such rules available to members of the public who may request them. In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner not inconsistent with these rules.

Rule 8019. Suspension of rules in Part VIII.

In the interest of expediting decision or for other good cause, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002 and 8013, and may order proceedings in accordance with its direction.

PART IX. GENERAL PROVISIONS

Rule 9001. General definitions.

The definitions of words and phrases in § 101, § 902 and § 1101 and the rules of construction in § 102 of the Code govern their use in these rules. In addition, the following words and phrases used in these rules have the meanings indicated:

(1) "Act" means the Bankruptcy Act of 1898 as amended.

(2) "Bankruptcy court," "court," or "United States Bankruptcy Court" means the court of bankruptcy as defined in § 1(10) and created under § 2a of the Act and the United States Bankruptcy Court created under 28 U. S. C. § 151.

(3) "Bankruptcy Code" or "Code" means title 11 of the United States Code.

(4) "Clerk" means clerk of the bankruptcy court.

(5) "Debtor." When any act is required by these rules to be performed by a debtor or when it is necessary to compel attendance of a debtor for examination and the debtor is not a natural person: (A) if the debtor is a corporation, "debtor" includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control; (B) if the debtor is a partnership, "debtor" includes any or all of its general partners or, if designated by the court, any other person in control.

(6) "Firm" includes a partnership or professional corporation of attorneys or accountants.

(7) "Judgment" means any appealable order.

(8) "Mail" means first class, postage prepaid.

(9) "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

(10) "Trustee" includes a debtor in possession in a chapter 11 case.

Rule 9002. Meanings of words in the federal rules of civil procedure when applicable to cases under the code.

The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context:

(1) "Action" or "civil action" means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.

(2) "Appeal" means an appeal as provided by 28 U. S. C. § 1334 or § 1482.

(3) "Clerk" or "clerk of the district court" means clerk of the bankruptcy court.

(4) "District court," "trial court," "court," or "judge" means bankruptcy judge.

(5) "Judgment" includes any order appealable to an appellate court.

Rule 9003. Prohibition of ex parte contacts.

Except as otherwise permitted by applicable law, any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the bankruptcy judge concerning matters affecting a particular case or proceeding.

Rule 9004. General requirements of form.

(a) Legibility; abbreviations.—All petitions, pleadings, schedules and other papers shall be clearly legible. Abbreviations in common use in the English language may be used.

(b) Caption.—Each paper filed shall contain a caption setting forth the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper.

Rule 9005. Harmless error.

Rule 61 F. R. Civ. P. applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial rights.

Rule 9006. Time.

(a) Computation.—In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other

day appointed as a holiday by the President or the Congress of the United States, or by the state in which the bankruptcy court is held.

(b) Enlargement.

(1) In general.—Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) Enlargement not permitted.—The court may not enlarge the time for taking action under Rule 1007(d), 1017 (b)(3), 1019(2), 2003(a) and (d), 4001(b), 7052, 9015(f), 9023, and 9024.

(3) Enlargement limited.—The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those rules.

(c) Reduction.

(1) In general.—Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

(2) Reduction not permitted.—The court may not reduce the time for taking action under Rules 2002(a)(4) and (a)(8), 2003(a), 3002(c), 3014, 3015, 4003(a), 4004(a), 4007(c) and 8002.

(d) For motions—affidavits.—A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than five days before the time specified for such hearing, unless a different period is

fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) Time of service.—Service of process and service of any paper other than process or of notice by mail is complete on mailing.

(f) Addditional time after service by mail.—When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Rule 9007. General authority to regulate notices.

When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the persons to whom, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined.

Rule 9008. Service or notice by publication.

Whenever these rules require or authorize service or notice by publication, the court shall, to the extent not otherwise specified in these rules, determine the form and manner thereof, including the newspaper or other medium to be used and the number of publications.

Rule 9009. Forms.

The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United

States Courts may issue additional forms for use under the Code.

Rule 9010. Representation and appearances; powers of attorney.

(a) Authority to act personally or by attorney.—A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in his or its own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) Notice of appearance.—An attorney appearing for a party in a case under the Code shall file a notice of appearance with his name, office address and telephone number, unless his appearance is otherwise noted in the record.

(c) Power of attorney.—The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to Official Form No. 17 or Official Form No. 18. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U. S. C. §459, §953, or a person authorized to administer oaths under the laws of the state where the oath is administered.

Rule 9011. Signing and verification of papers.

(a) Signature.—Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in his individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state his address and telephone number. The signature of an attorney or a party constitutes a certifi-

cate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) Verification.—Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U. S. C. § 1746 satisfies the requirement of verification.

(c) Copies of signed or verified papers.—When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Rule 9012. Affirmations.

When in a case under the Code an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

Rule 9013. Motions: form and service.

A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those persons specified by these rules or, if service is not required or the persons to be served are not specified by these rules, the moving party shall serve the persons the court directs.

Rule 9014. Contested matters.

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 9015. Jury trial.

(a) Trial by jury.—Issues triable of right by jury shall, if timely demanded, be by jury, unless the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

(b) Demand.

(1) Time; form.—Any party may demand a trial by jury of any issue triable by a jury by serving on the other parties a

demand therefor in writing not later than 10 days after service of the last pleading directed to such issue. The demand may be indorsed on a pleading of the party. When a jury trial is demanded it shall be designated by the clerk in the docket as a jury matter.

(2) Specification of issues.—In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury of all the issues so triable. If he has demanded trial by jury of only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues.

(3) Determination by court.—On motion or on its own initiative the court may determine whether there is a right to trial by jury of the issues for which a jury trial is demanded or whether a demand for trial by jury in a proceeding on a contested petition shall be granted.

(c) Waiver.—The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5005 constitutes a waiver of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(d) Trial by the court.—Issues not demanded for trial by jury shall be tried by the court. Notwithstanding the failure of a party to demand a jury when such a demand might have been made of right, the court on its own initiative may order a trial by jury of any or all issues.

(e) Advisory jury and trial by consent.—In all actions not triable of right by jury the court on motion or on its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(f) Applicability of certain of the federal rules of civil procedure.—Rules 47–51 of F. R. Civ. P. apply when a jury trial is conducted.

Rule 9016. Subpoena.

Rule 45 F. R. Civ. P. applies in bankruptcy cases under the Code.

Rule 9017. Evidence.

The Federal Rules of Evidence and Rules 43, 44 and 44.1 F. R. Civ. P. apply in cases under the Code.

Rule 9018. Secret confidential, scandalous, or defamatory matter.

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

Rule 9019. Compromise and arbitration.

(a) Compromise.—On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

(b) Authority to compromise or settle controversies within classes.—After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) Arbitration.—On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Rule 9020. Criminal contempt proceedings.

(a) Procedure.

(1) Summary disposition.—Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U. S. C. § 1481 may be punished summarily by a bankruptcy judge if he saw or heard the conduct constituting the contempt and if it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(2) Disposition after a hearing.—Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U. S. C. § 1481, except when determined as provided in paragraph (1) of this subdivision, may be punished by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the criminal contempt charged and describe the contempt as criminal and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Certification to district court.—If it appears to a bankruptcy judge that criminal contempt has occurred but the court is without power under 28 U. S. C. § 1481, to punish or to impose the appropriate punishment for the criminal contempt the judge may certify the facts to the district court.

(b) Right to jury trial.—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Rule 9021. Entry of judgment; district court record of judgment.

(a) Original entry of judgment of bankruptcy court.—Subject to the provisions of Rule 54(b) F. R. Civ. P.: (1) on a general verdict of a jury, or on a decision by the court that a

party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the court; (2) on a decision by the court granting other relief, or on a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. Entry of the judgment shall not be delayed for the taxing of costs.

(b) District court record of judgments of bankruptcy courts.—On certification by the clerk of the bankruptcy court to the clerk of the district court of a copy of a judgment of the bankruptcy court for the recovery of money or property, the clerk of the district court shall keep and index the copy in substantially the form and manner prescribed by Rule 79 F. R. Civ. P. for judgments of the district court. Retention and indexing of a judgment by the clerk of the district court under this subdivision shall not affect its appealability or proceedings on appeal from the judgment under the rules in Part VIII, the availability of process to enforce the judgment under Rule 7069, or the availability of relief under Rule 7062 or 7070 but after it has been so indexed, the judgment shall have the same effect and may be enforced as a judgment of the district court so indexed.

(c) Entry of judgment of district court.—A judgment entered by a district judge in a case or proceeding under the Code shall be indexed in the district court's civil docket. The clerk of the district court shall certify a copy of the judgment to the clerk of the bankruptcy court.

Rule 9022. Notice of judgment or order.

(a) Judgment or order of bankruptcy judge.—Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail in the manner provided by Rule

7005 on the contesting parties and on other entities as the court directs. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

(b) Judgment or order of district judge.—Notice of a judgment or order entered by a district judge while acting in a case under the Code is governed by Rule 77(d) F. R. Civ. P.

Rule 9023. New trials; amendment of judgments.

Rule 59 F. R. Civ. P. applies in cases under the Code, except as provided in Rule 3008.

Rule 9024. Relief from judgment or order.

Rule 60 F. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330.

Rule 9025. Security: proceedings against sureties.

Whenever the Code or these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

Rule 9026. Exceptions unnecessary.

Rule 46 F. R. Civ. P. applies in cases under the Code.

Rule 9027. Removal.

(a) Application.

(1) Where filed; form and content.—An application for removal shall be filed in the bankruptcy court for the district and division within which is located the state or federal court where the civil action is pending. The application shall be verified and contain a short and plain statement of the facts which entitle the applicant to remove and be accompanied by a copy of all process and pleadings.

(2) Time for filing; civil action initiated before commencement of the case under the Code.—If the claim or cause of action in a civil action is pending when a case under the Code is commenced, an application for removal may be filed in the bankruptcy court only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) Time for filing; civil action initiated after commencement of the case under the Code.—If a case under the Code is pending when a claim or cause of action is asserted in a court other than a bankruptcy court, an application for removal may be filed in the bankruptcy court only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) Bond.—An application for removal, except when the applicant is the trustee, debtor, debtor in possession, or the United States shall be accompanied by a bond with good and sufficient surety conditioned that the party will pay all costs and disbursements incurred by reason of the removal should it be determined that the claim or cause of action was not removable or was improperly removed.

(c) Notice.—Promptly after filing the application and the bond, if required, in the bankruptcy court, the applicant shall serve a copy of the application on all parties to the removed claim or cause of action.

(d) Filing in non-bankruptcy court.—Removal of the claim or cause of action is effected on the filing of a copy of the removal application with the clerk of the court from which the claim or cause of action is removed. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(e) Remand.—A motion for remand of the removed claim or cause of action may be filed only in the bankruptcy court and shall be served on the parties to the removed claim or cause of action. A motion to remand shall be determined as soon as practicable. A certified copy of an order of remand shall be mailed to the clerk of the court from which the claim or cause of action was removed.

(f) Procedure after removal.

(1) After removal of a claim or cause of action to a bankruptcy court the bankruptcy court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The bankruptcy court may require the applicant to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(g) Process after removal.—If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued in the same manner as in adversary proceedings originally filed in the bankruptcy court. This subdivision shall not deprive any defendant on whom process is served after removal of his right to move to remand the case.

(h) Applicability of Part VII.—The rules of Part VII apply to a claim or cause of action removed to a bankruptcy

court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the application for removal, whichever period is longest.

(i) Time for filing a demand for jury trial.—If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury shall be accorded it, if his demand therefor is served within 10 days following the filing of the application for removal if he is the applicant, or if he is not the applicant, within 10 days following service on him of notice of the filing of the application. A party who, prior to removal, has made an express demand for trial by jury in accordance with federal or state law, need not renew the demand after removal. If state law applicable in the court from which the claim or cause of action is removed does not require the parties to make an express demand for trial by jury, they need not make a demand after removal unless the bankruptcy court so directs. The bankruptcy court may so direct on its own initiative and shall so direct at the request of any party to the removed claim or cause of action. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

(j) Record supplied.—When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in a bankruptcy court, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the bankruptcy court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the bankruptcy court, and all

process awarded, as if certified copies had been filed in the bankruptcy court.

(k) Attachment or sequestration; securities.—When a claim or cause of action is removed to a bankruptcy court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the bankruptcy court.

Rule 9028. Disability of a judge.

If by reason of death, sickness, or other disability, a judge before whom an involuntary petition or an adversary proceeding has been tried or a hearing conducted is unable to perform the duties to be performed by the court under these rules after a verdict is returned, or findings of fact and conclusions of law or a memorandum is filed, then any other judge regularly sitting in or assigned to the court in which the trial or hearing was conducted may perform those duties; but if the other judge is satisfied that he cannot perform those duties because he did not preside or for any other reason, he may in his discretion grant a new trial.

Rule 9029. Local bankruptcy rules.

Each bankruptcy court by action of a majority of the judges thereof may make and amend rules governing its practice and procedure not inconsistent with these rules. Copies of rules and amendments so made shall on their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of the rules available to members of the public who may request them. In all cases not provided for by rule, the bankruptcy court may regulate its practice in any manner not inconsistent with these rules.

Rule 9030. Jurisdiction and venue unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the bankruptcy courts or the venue of any matters therein.

Rule 9031. Masters not authorized.

Rule 53 F. R. Civ. P. does not apply in cases under the Code.

Rule 9032. Effect of amendment of federal rules of civil procedure.

The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment.

PART X. UNITED STATES TRUSTEES

Rule X-1001. Applicability of rules.

(a) Part X rules.—The rules in Part X apply to cases under the Code filed in or transferred to any district in which a United States trustee is authorized.

(b) Inapplicability of rules.—The following rules do not apply in cases under the Code filed in or transferred to any district specified in subdivision (a) of this rule: 2001(a), (c), 2002(a)(1), 2003(a), (b)(1), (2), (d), 2007, 2008, 2009(c), (d), (e), 2010(a), 5008, and the second sentence of 6003.

Rule X-1002. Petitions, lists, schedules and statements.

(a) Petitions and accompanying materials.

(1) Number of copies.—In addition to the number of copies required to be filed pursuant to Rules 1002(b), 1003(b) and 1007(f), there shall be filed one copy of the petition, the list of creditors, the schedule of assets and liabilities, the statement of financial affairs, the statement of executory contracts, and the Chapter 13 Statement and any amendments thereto.

(2) Transmission to United States trustee.—The clerk shall forthwith transmit to the United States trustee the additional copies filed pursuant to this subdivision. Written notice of a hearing for an extension of time to file schedules, statements and lists pursuant to Rule 1007(a)(4) shall be given the United States trustee.

(b) Filing lists by debtor in Chapter 11 reorganization cases.—In chapter 11 cases, the debtor shall file an additional copy of the lists of creditors and of the 20 largest unsecured creditors required by Rule 1007(a) and (d). The lists shall contain additional information as the United States trustee may require and one copy of each shall be transmitted forthwith by the clerk to the United States trustee.

Rule X–1003. Appointment of interim trustee before order for relief in a Chapter 7 liquidation case.

(a) Appointment.—At any time following the commencement of an involuntary liquidation case and before an order for relief, the court on written motion of a party in interest may order the appointment of an interim trustee under § 15303 of the Code. The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the United States trustee, and other parties in interest as the court may designate.

(b) Form of order.—The order directing the appointment of an interim trustee shall state why the appointment is necessary and shall specify the trustee's duties.

Rule X–1004. Notification to trustee of selection; blanket bond.

(a) Notification.—The United States trustee shall immediately notify the trustee of his selection, how he may qualify,

and, if applicable, the amount of the bond. The trustee shall give written notification to the court and the United States trustee of the acceptance or rejection of the office within five days after receipt of notice of selection.

(b) Blanket bond.—The United States trustee may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.

Rule X–1005. Trustees for estates when joint administration ordered.

(a) Appointment of trustees for estates being jointly administered.

(1) Chapter 7 liquidation cases.—The United States trustee may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.

(2) Chapter 11 reorganization cases.—If a trustee is ordered, the United States trustee may appoint one or more trustees for estates being jointly administered in chapter 11 cases.

(3) Chapter 13 individual's debt adjustment cases.—The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 13 cases.

(b) Potential conflicts of interest.—On a showing that creditors of the different estates will be prejudiced by conflicts of interest of a common trustee the court shall order the appointment of separate trustees for estates being jointly administered.

Rule X–1006. Meetings of creditors or equity security holders.

(a) Date and place.—The United States trustee shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a

later time for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest.

(b) Order of meeting.

(1) Meeting of creditors.—The United States trustee or his designee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a trustee or of a creditors' committee. The presiding officer shall have the authority to administer oaths.

(2) Meeting of equity security holders.—If the court orders a meeting of equity security holders pursuant to § 341(b) of the Code, the United States trustee shall fix a date for the meeting and he or his designee shall preside.

(c) Report to the court.—The United States trustee shall transmit to the court the name and address of any person elected trustee or a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing of the dispute. Pending disposition of the dispute by the court, the interim trustee shall continue in office. If no motion for the resolution of the election dispute is made to the court within ten days after the date of the creditors' meeting, the interim trustee shall serve as trustee in the case.

(d) Special meetings.—The United States trustee may call a special meeting of creditors on application or on his own initiative.

(e) Final meeting.—If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $250, the clerk of the bankruptcy court shall mail a summary of the trustee's final account to the creditors with the notice of the meeting, together with a statement of the amount of the claims allowed. The trustee or his designee shall attend the final meeting and shall, if requested, report on the administration of the estate.

Rule X–1007. Duty of trustee or debtor in possession to make reports, furnish information, and cooperate with United States trustee.

(a) Duty to file inventory.—[illegible] trustee or debtor in possession shall file the inventory required by Rule 2015(a)(1) with the United States trustee and with the court if the court so directs.

(b) Duty to furnish information to, and cooperate with, United States trustee.—The trustee or debtor in possession shall cooperate with the United States trustee by furnishing such information as the United States trustee may reasonably require in supervising the administration of the estate. The trustee or debtor in possession in a chapter 11 reorganization case, and the debtor in a chapter 13 individual's debt adjustment case when the debtor is engaged in business, shall furnish the United States trustee and file with the clerk regular reports of operations as the United States trustee may reasonably require.

Rule X–1008. Notices to United States trustee.

(a) Notices to be furnished to United States trustees.—Unless the United States trustee otherwise requests, the United States trustee shall receive notice of and pleadings relating to:

(1) the matters described in Rule 2002(a)(2), (5), (7), 2002(b), and (f);

(2) applications for approval of the employment of professional persons under Rule 2014;

(3) applications for compensation of professional persons under Rule 2016;

(4) the hearing to consider a disclosure statement pursuant to Rule 3017;

(5) the hearing on the appointment of a trustee or examiner; and

(6) any other matter notice of which is requested by the United States trustee or ordered by the court.

(b) Time for notice to United States trustee.—Subject to Rule 2002, the United States trustee shall receive notice

within sufficient time to permit him to participate in the matter.

(c) United States trustee need not furnish notice.—The United States trustee shall not be required to give any notice provided for in Rule 2002(a) or (b).

Rule X–1009. Right to be heard; filing papers.

(a) Right to be heard.—The United States trustee may raise and appear and be heard on any issue relating to his responsibilities in a case under the Code.

(b) Filing of papers.—In the interest of effective administration, the court or the United States trustee may require a party in interest to file with the United States trustee a copy of any paper filed with the court.

Rule X–1010. Prohibition of ex parte contacts.

The United States trustee, his assistants, and agents shall refrain from ex parte meetings and communications with the bankruptcy judge concerning matters affecting a particular case or proceeding. This rule does not preclude communication with a bankruptcy judge to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 28, 1983, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1096. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, and 456 U. S. 1013.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 1983

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure which have been adopted by the Supreme Court pursuant to Title 28, United States Code, Section 2072.

Accompanying these rules is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

THURSDAY, APRIL 28, 1983

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein new Rules 26(g), 53(f), 72 through 76 and new Official Forms 33 and 34, and amendments to Rules 6(b), 7(b), 11, 16, 26(a) and (b), 52(a), 53(a), (b) and (c) and 67, as hereinafter set forth:

[See *infra*, pp. 1099–1115.]

2. That the foregoing additions and amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1983, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Time.

. . . . .

(b) Enlargement.—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

. . . . .

Rule 7. Pleadings allowed; form of motions.

. . . . .

(b) Motions and other papers.

. . . . .

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

. . . . .

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 16. Pretrial conferences; scheduling; management.

(a) Pretrial conferences; objectives.—In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) Scheduling and planning.—Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to be discussed at pretrial conferences.—The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unncessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final pretrial conference.—Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial orders.—After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions.—If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule

37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 26. General provisions governing discovery.

(a) Discovery methods.—Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits.—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general.—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

. . . . .

(g) Signing of discovery requests, responses, and objections.—Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 52. Findings by the court.

(a) Effect.—In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

. . . . .

Rule 53. Masters.

(a) Appointment and compensation.—The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U. S. C. § 636(b)(2). The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by

the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference.—A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers.—The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

. . . . .

(f) A magistrate is subject to this rule only when the order referring a matter to the magistrate expressly provides that the reference is made under this Rule.

Rule 67. Deposit in court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U. S. C., §§2041, and 2042; the Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U. S. C., Title 31, §725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

Rule 72. Magistrates; pretrial matters.

(a) Nondispositive matters.—A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. The district judge to whom the case is assigned shall consider objections made by the parties, provided they are served and filed within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(b) Dispositive motions and prisoner petitions.—A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposi-

tion of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

Rule 73. Magistrates; trial by consent and appeal options.

(a) Powers; procedure.—When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate may exercise the authority provided by Title 28, U. S. C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U. S. C. § 636(c)(7).

(b) Consent.—When a magistrate has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate of civil jurisdiction over the case, as authorized by Title 28, U. S. C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate's exercise of such authority, they shall execute and file a joint

form of consent or separate forms of consent setting forth such election.

No district judge, magistrate, or other court official shall attempt to persuade or induce a party to consent to a reference of a civil matter to a magistrate under this rule, nor shall a district judge or magistrate be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate.

The district judge, for good cause shown on his own motion or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate under this subdivision.

(c) Normal appeal route.—In accordance with Title 28, U. S. C. § 636(c)(3), unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule, appeal from a judgment entered upon direction of a magistrate in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

(d) Optional appeal route.—In accordance with Title 28, U. S. C. § 636(c)(4), at the time of reference to a magistrate, the parties may consent to appeal on the record to a judge of the district court and thereafter, by petition only, to the court of appeals.

Rule 74. Method of appeal from magistrate to district judge under Title 28, U. S. C. § 636(c)(4) and Rule 73(d).

(a) When taken.—When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate under the consent provisions of Title 28, U. S. C. § 636(c)(4), an appeal may be taken from the decision of a magistrate by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days

thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate by any party, and the full time for appeal from the judgment entered by the magistrate commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

An interlocutory decision or order by a magistrate which, if made by a judge of the district court, could be appealed under any provision of law, may be appealed to a judge of the district court by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a judge of the district court under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate unless the magistrate or judge shall so order.

Upon a showing of excusable neglect, the magistrate may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.

(b) Notice of appeal; service.—The notice of appeal shall specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and state that the appeal is to a judge of the district court. The clerk shall mail copies of the notice to all other parties and note the date of mailing in the civil docket.

(c) Stay pending appeal.—Upon a showing that the magistrate has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be condi-

tioned upon the filing in the district court of a bond or other appropriate security.

(d) Dismissal.—For failure to comply with these rules or any local rule or order, the district judge may take such action as is deemed appropriate, including dismissal of the appeal. The district judge also may dismiss the appeal upon the filing of a stipulation signed by all parties, or upon motion and notice by the appellant.

Rule 75. Proceedings on appeal from magistrate to district judge under Rule 73(d).

(a) Applicability.—In proceedings under Title 28, U. S. C. §636(c), when the parties have previously elected under Rule 73(d) to appeal to a district judge rather than to the court of appeals, this rule shall govern the proceedings on appeal.

(b) Record on appeal.

(1) Composition.—The original papers and exhibits filed with the clerk of the district court, the transcript of the proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

(2) Transcript.—Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as he deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, within 10 days after the service of the statement of the appellant, he shall serve on the appellant and file with the court a designation of addi-

tional parts to be included. The appellant shall promptly make arrangements for the inclusion of all such parts unless the magistrate, upon motion exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.

(3) Statement in lieu of transcript.—If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of the transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate for settlement.

(c) Time for filing briefs.—Unless a local rule or court order otherwise provides, the following time limits for filing briefs shall apply.

(1) The appellant shall serve and file his brief within 20 days after the filing of the transcript, statement of the case, or statement of the evidence.

(2) The appellee shall serve and file his brief within 20 days after service of the brief of the appellant.

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee.

(4) If the appellee has filed a cross-appeal, he may file a reply brief limited to the issues on the cross-appeal within 10 days after service of the reply brief of the appellant.

(d) Length and form of briefs.—Briefs may be typewritten. The length and form of briefs shall be governed by local rule.

(e) Oral argument.—The opportunity for the parties to be heard on oral argument shall be governed by local rule.

Rule 76. Judgment of the district judge on the appeal under Rule 73(d) and costs.

(a) Entry of judgment.—When the parties have elected under Rule 73(d) to appeal from a judgment of the magistrate to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magis-

trate, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.

(b) Stay of judgments.—The decision of the district judge shall be stayed for 10 days during which time a party may petition the district judge for rehearing, and a timely petition shall stay the decision of the district judge pending disposition of a petition for rehearing. Upon the motion of a party, the decision of the district judge may be stayed in order to allow a party to petition the court of appeals for leave to appeal.

(c) Costs.—Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.

APPENDIX OF FORMS

FORM 33

NOTICE OF RIGHT TO CONSENT TO THE EXERCISE OF CIVIL JURISDICTION BY A MAGISTRATE AND APPEAL OPTION

In accordance with the provisions of Title 28, U. S. C. § 636(c), you are hereby notified that the United States magistrates of this district court, in addition to their other duties, upon the consent of all parties in a civil case, may conduct any or all proceedings in a civil case including a jury or nonjury trial, and order the entry of a final judgment.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate must be entirely voluntary. Only if all the parties to the case consent to the reference to a magistrate will either the judge or magistrate to whom the case has been assigned be informed of your decision.

An appeal from a judgment entered by a magistrate may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.

Copies of the Form for the "Consent to Proceed Before a United States Magistrate" and "Election of Appeal to a District Judge" are available from the clerk of the court.

FORM 34

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE, ELECTION OF APPEAL TO DISTRICT JUDGE, AND ORDER OF REFERENCE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF

x
Plaintiff, :
vs. : Docket
No.
Defendant. :
x

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of Title 28, U. S. C. § 636(c), the parties to the above-captioned civil matter hereby voluntarily waive their rights to proceed before a judge of the United States district court and consent to have a United States magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

Date

ELECTION OF APPEAL TO DISTRICT JUDGE

[Do not execute this portion of the Consent Form if the parties desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U. S. C. § 636(c)(4), the parties elect to take any appeal in this case to a district judge.

Date

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate ____________ for all further proceedings and the entry of judgment in accordance with Title 28, U. S. C. § 636(c) and the foregoing consent of the parties.

U. S. District Judge

NOTE: Return this form to the Clerk of the Court only if all parties have consented to proceed before a magistrate.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 28, 1983, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1118. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, and 456 U. S. 1021.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 1983

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Title 18, United States Code, Sections 3771 and 3772. JUSTICE O'CONNOR dissents from the adoption of these rules.

Accompanying these rules is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

THURSDAY, APRIL 28, 1983

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein new Rules 11(h), 12(i) and 12.2(e), and amendments to Rules 6(e) and (g), 11(a), 12.2(b), (c) and (d), 16(a), 23(b), 32(a), (c) and (d), 35(b) and 55, as hereinafter set forth:

[See *infra*, pp. 1121–1127.]

2. That Rule 58 of the Federal Rules of Criminal Procedure and the Appendix of Forms are hereby abrogated.

3. That the foregoing additions and amendments to the Federal Rules of Criminal Procedure, together with the abrogation of Rule 58 and the Official Forms, shall take effect on August 1, 1983, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

JUSTICE O'CONNOR filed a dissenting statement.

With one minor reservation, I join the Court in its adoption of the proposed amendments. They represent the product of considerable effort by the Advisory Committee, and they will institute desirable reforms. My sole disagreement with the Court's action today lies in its failure to recommend correction of an apparent error in the drafting of proposed Rule 12.2(e).

As proposed, Rule 12.2(e) reads:

> "Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not ad-

> missible in any civil or criminal proceeding against the person who gave notice of the intention."

Identical language formerly appeared in Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410, each of which stated that

> "[certain material] is not admissible in any civil or criminal proceeding against the [defendant]."

Those Rules were amended by this Court on April 30, 1979, 441 U. S. 987 and 1007, and approved by Congress on July 31, 1979, Pub. L. 96–42, 93 Stat. 326. After the amendments, the relevant language read:

> "[Certain material] is not, in any civil or criminal proceeding, admissible against the defendant."

As the Advisory Committee explained, this minor change was necessary to eliminate an ambiguity. Before the amendments, the word "against" could be read as referring either to the kind of proceeding in which the evidence was offered or to the purpose for which it was offered. Thus, for instance, if a person was a witness in a suit but not a party, it was unclear whether the evidence could be used to impeach him. In such a case, the *use* would be against the person, but the *proceeding* would not be against him. Similarly, if the person wished to introduce the evidence in a proceeding in which he was the defendant, the use, but not the proceeding, would be against him. To eliminate the ambiguity, the Advisory Committee proposed the amendment clarifying that the evidence was inadmissible against the person, regardless of whether the particular proceeding was against the person. See Advisory Committee's Notes to Fed. Rule Crim. Proc. 11(e)(6), 18 U. S. C. App., p. 1029 (1976 ed., Supp. V); Advisory Committee's Notes to Fed. Rule Evid. 410, 28 U. S. C. App., p. 160 (1976 ed., Supp. V).

The same ambiguity inheres in the proposed version of Rule 12.2(e). We should recommend that it be eliminated now. To that extent, I respectfully dissent.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The grand jury.

. . . . .

(e) Recording and disclosure of proceedings.

. . . . .

(3) Exceptions.

. . . . .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

READEX FICHE

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

. . . . .

(5) Closed hearing.—Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed records.—Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

. . . . .

(g) Discharge and excuse.—A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

Rule 11. Pleas.

(a) Alternatives.

(1) In general.—A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional pleas.—With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

* * * * *

(h) Harmless error.—Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Rule 12. Pleadings and motions before trial; defenses and objections.

* * * * *

(i) Production of statements at suppression hearing.—Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter.

Rule 12.2. Notice of insanity defense or expert testimony of defendant's mental condition.

* * * * *

(b) Expert testimony of defendant's mental condition.—If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental examination of defendant.—In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a mental examination by a psychiatrist or other expert designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to comply.—If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental condition.

(e) Inadmissibility of withdrawn intention.—Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

Rule 16. Discovery and inspection.

* * * * *

(a) Disclosure of evidence by the government.

* * * * *

(3) Grand jury transcripts.—Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

Rule 23. Trial by jury or by the court.

* * * * *

(b) Jury of less than twelve.—Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be re-

turned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

Rule 32. Sentence and judgment.

(a) Sentence.

(1) Imposition of sentence.—Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

. . . . .

(c) Presentence investigation.

. . . . .

(3) Disclosure.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion, otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U. S. C. §§4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Plea withdrawal.—If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U. S. C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U. S. C. § 2255.

. . . . .

Rule 35. Correction or reduction of sentence.

. . . . .

(b) Reduction of sentence.—The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Rule 55. Records.

The clerk of the district court and each United States magistrate shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.

[Rule 58. Forms] (Abrogated)

[APPENDIX OF FORMS]

(Abrogated)

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1127 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

EVANS *v.* ALABAMA

ON APPLICATION FOR STAY

No. A-848 (82-6581). Decided April 21, 1983

An application for a stay of execution of applicant's death sentence, pending the disposition of his petition for certiorari to review the Alabama Supreme Court's denial of his motion requesting a new sentencing hearing, is denied. Applicant's constitutional challenges to Alabama's capital-sentencing procedures have been rejected by several state and federal courts.

JUSTICE POWELL, Circuit Justice.

This is an application for a stay of execution set for April 22, 1983, pending the disposition of a petition for certiorari to the Alabama Supreme Court. The petition for certiorari was filed on April 19, 1983. This application was filed later the same day, following the Alabama Supreme Court's denial of applicant's motion for a stay of execution. On April 20 the State filed a response in opposition to the application for a stay, and applicant filed a reply to the State's opposition.

Applicant was tried and convicted on April 26, 1977, in the Mobile County, Ala., Circuit Court of first-degree murder committed during the commission of a robbery. The trial court sentenced him to death. Applicant's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, *Evans* v. *State*, 361 So. 2d 654 (1977), and the Alabama Supreme Court, 361 So. 2d 666 *(per curiam)*, rehearing denied, 361 So. 2d 672 (1978) *(per curiam)*. This Court denied a petition for certiorari. 440 U. S. 930 (1979).

In April 1979 applicant filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama, challenging the constitutionality of both the conviction and the death sentence. The District Court rejected all of his contentions and denied the petition. *Evans* v. *Britton*, 472 F. Supp. 707 (1979). The Court of Appeals for the Fifth Circuit reversed, finding that applicant's conviction was invalid. *Evans* v. *Britton*, 628 F. 2d 400 (1980) *(per curiam)*, modified on rehearing, 639 F. 2d 221 (1981) *(per curiam)*. This Court granted the State's petition for a writ of certiorari and, after briefing and argument, reversed the judgment of the Court of Appeals. *Hopper* v. *Evans*, 456 U. S. 605 (1982).

This Court's judgment reinstated applicant's conviction, but his challenges to Alabama's capital-sentencing procedures remained to be decided by the Court of Appeals on remand. In July 1982, however, applicant dismissed his attorneys and filed a motion with the Court of Appeals seeking to dismiss his appeal. The court dismissed the appeal on October 19, 1982.

On October 22, 1982, the State of Alabama sought an order from the Alabama Supreme Court setting an execution date. Applicant then filed a motion requesting a new sentencing hearing. On February 18, 1983, the Alabama Supreme Court denied this motion, and on April 8, 1983, the court ordered that applicant's execution be set for April 22, 1983.

Applicant's constitutional challenges to Alabama's capital-sentencing procedures have been reviewed exhaustively and repetitively by several courts in both the state and federal systems. I have reviewed the record and conclude that there is not "a reasonable probability that four Members of the Court would find that this case merits review." *White* v. *Florida*, 458 U. S. 1301, 1302 (1982) (POWELL, J., in chambers). All of the papers relevant to applicant's request for a stay of execution also have been circulated to the entire Court. With the concurrence of six other Members of the Court, I deny the application for a stay.

JUSTICE BRENNAN and JUSTICE MARSHALL have indicated that they would vote to grant the stay.

VOLKSWAGENWERK A. G. *v.* FALZON ET AL., INDIVIDUALLY AND AS NEXT FRIENDS OF FALZON ET AL.

ON APPLICATION FOR STAY

No. A–875. Decided April 29, 1983

Pursuant to this Court's Rule 44.4, under the "most extraordinary circumstances" of this case an application to stay the Michigan state trial court's order in an action against applicant, a German corporation, directing the taking of depositions of a number of applicant's employees who reside in the Federal Republic of Germany, is granted pending the Michigan Supreme Court's disposition of an application there to stay the taking of the depositions.

JUSTICE O'CONNOR, Circuit Justice.

Under Rule 44.4, the Justices of this Court will not entertain an application for a stay unless the applicant has first sought relief from the appropriate lower court or courts, except "in the most extraordinary circumstances." I conclude that this case presents most extraordinary circumstances and will therefore entertain the application and grant a stay.

The applicant is a German corporation that is defending an action in the Michigan state courts. The plaintiffs in that action seek to depose a number of employees of the applicant, all of whom reside in the Federal Republic of Germany. Attempting to prevent the depositions in the trial court, the applicant argued that the method the plaintiffs sought to employ violated the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, [1972] 23 U. S. T. 2555, T. I. A. S. 7444, a treaty to which the United States and the Federal Republic of Germany are parties. See Department of State, Treaties in Force 249 (1983). The trial court denied the motion, and the Michigan Court of Appeals denied leave to appeal. The applicant then sought review in the Michigan Supreme Court. Meanwhile, the trial court ordered that the depositions take place on or before August 30, 1982, and the plaintiffs filed notice to take the depositions on

August 24, 1982. The applicant then applied to the Michigan Supreme Court for an emergency stay of the order and for immediate consideration of the order. When the State Supreme Court did not act, the applicant sought a stay from this Court, and on August 23, 1982, THE CHIEF JUSTICE granted a stay pending final disposition of the appeals before the Michigan Supreme Court. *Volkswagenwerk A. G.* v. *Falzon*, A–191, O. T. 1981. He later denied a motion to vacate the stay. *Volkswagenwerk A. G.* v. *Falzon*, A–191, O. T. 1981 (order of Sept. 2, 1982).

On February 22, 1983, the Michigan Supreme Court denied the applicant's application for leave to appeal. At that point, the stay entered by THE CHIEF JUSTICE expired by its own terms. The plaintiffs then filed notice of taking depositions, scheduling the depositions for May 2, 1983. On April 4, 1983, the applicant sought a stay of the depositions from the Michigan Supreme Court, pending disposition of its appeal to this Court of the earlier judgment of the Michigan Supreme Court. The State Supreme Court has not acted, so the applicant now seeks a stay from this Court pending disposition of the appeal here.

In granting the stay pending the disposition of the appeal to the Michigan Supreme Court, THE CHIEF JUSTICE must have concluded that there was a substantial chance that four Justices would agree to consider the case on the merits, that there was a significant chance that the applicant would prevail, and that the injury resulting from the denial of a stay would be irreparable. See generally *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers). Since the question on the merits is unchanged, it is essentially the "law of the case" that a stay would be appropriate, unless, of course, the response presents new information. Cf. *Schlesinger* v. *Holtzman*, 414 U. S. 1321, 1324–1325, and nn. 3, 4 (1973) (Doug[illegible], J., dissenting) (single Justice not empowered to vacate stay granted by another Justice); R. Stern & E. Gressman, Supreme Court Practice 866–867 (5th ed. 1978) (same). Consequently, the failure of the Michigan Supreme Court to act promptly should not prevent a Member of this Court from entertaining an application to stay the order pending final disposition of the appeal in this Court. Proper deference to the Michigan Supreme Court, however, requires that that court have an opportunity to dispose of the stay application before it. Accordingly, I grant the stay pending disposition of the application for a stay in the Michigan Supreme Court.

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I. Commerce Clause.

Rural electric power cooperative—State regulation of wholesale rates.—Arkansas Public Service Commission's assertion of jurisdiction over wholesale rates charged by a rural electric power cooperative to its member cooperatives, which in turn serve ultimate consumers, did not offend either Commerce Clause or Supremacy Clause as being pre-empted by Federal Power Act or Rural Electrification Act. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, p. 375.

II. Due Process.

1. *Interstate transfer of prisoner—Hawaii prison regulations.*—An interstate transfer of a prisoner does not deprive him of any liberty interest protected by Due Process Clause in and of itself; nor do Hawaii's prison regulations—which place no substantive limitations on a prison administrator's discretion to transfer an inmate—create a constitutionally protected liberty interest, and thus respondent inmate, who was transferred from a Hawaii prison to a California prison, was not denied due process on asserted ground that a Hawaii regulation was violated when same Hawaii prison committee that investigated a breakdown in prison discipline and identified respondent as a troublemaker also conducted a hearing that resulted in committee's recommendation to prison administrator that respondent be transferred. Olim v. Wakinekona, p. 238.

2. *Loitering statute—Vagueness.*—A California statute, as drafted and as construed by California Court of Appeal to require persons who loiter or wander on streets to provide a "credible and reliable" identification when requested by a police officer, is unconstitutionally vague on its face within meaning of Due Process Clause of Fourteenth Amendment. Kolender v. Lawson, p. 352.

CONSTITUTIONAL LAW—Continued.

3. *Violation of customs laws—Government's delay in instituting forfeiture proceeding.*—Where customs inspector seized $8,850 in United States currency from claimant when she entered country without reporting that she was carrying more than $5,000, as required by Bank Secrecy Act of 1970, and where there was an 18-month delay before Government filed a proceeding for forfeiture of currency, but during delay Government successfully prosecuted claimaint for willfully making false statements to a customs officer, such delay in filing forfeiture proceeding did not violate claimaint's due process rights. United States v. $8,850, p. 555.

III. Equal Protection of the Laws.

1. *Admission to public schools—Residence requirement.*—A Texas statute permitting a school district to deny tuition-free admission to a minor who lives apart from a parent, guardian, or other person having lawful control of him if his presence in district is for primary purpose of attending public school, is a bona fide residence requirement and does not violate Equal Protection Clause or burden constitutional right of interstate travel. Martinez v. Bynum, p. 321.

2. *Internal Revenue Code—Tax-exempt organizations—Prohibition of lobbying activities.*—Section 501(c)(3) of Internal Revenue Code of 1954, which denies tax-exempt status to certain nonprofit organizations if lobbying is a substantial part of their activities—thereby rendering taxpayers contributions to such organizations nondeductible—does not violate equal protection component of Fifth Amendment even though Code authorizes tax-exempt status for veterans' organizations that engage in lobbying. Regan v. Taxation With Representation of Washington, p. 540.

IV. Freedom of Speech.

1. *Internal Revenue Code—Tax-exempt organizations—Prohibition of lobbying activities.*—Section 501(c)(3) of Internal Revenue Code of 1954, which denies tax-exempt status to certain nonprofit organizations if lobbying is a substantial part of their activities—thereby rendering taxpayers' contributions to such organizations nondeductible—does not violate First Amendment free speech guarantees. Regan v. Taxation With Representation of Washington, p. 540.

2. *Picketing at Supreme Court—Public sidewalks.*—Title 40 U. S. C. § 13k—which prohibits display of any flag, banner, or device designed to bring into public notice any party or organization in Supreme Court building or its grounds, including public sidewalks that constitute outer boundaries of grounds—violates free speech guarantee of First Amendment as applied to public sidewalks surrounding building. United States v. Grace, p. 171.

3. *Public employee's distribution of questionnaire—Discharge from employment.*—Free speech guarantee of First Amendment was not violated

CONSTITUTIONAL LAW—Continued.

by respondent's discharge from her position as an Assistant District Attorney when, after she opposed her transfer to different duties in office, she distributed a questionnaire to other Assistant District Attorneys concerning office transfer policy and morale, need for a grievance committee, and level of confidence in supervisors, and also concerning whether employees felt pressured to work in political campaigns. Connick v. Myers, p. 138.

V. Right to Counsel.

Change of defense counsel—Denial of continuance.—Respondent's Sixth Amendment right to counsel was not violated where state court denied his motion for a continuance, made after his criminal trial began, on asserted ground that his attorney—who had been assigned to represent him when Deputy Public Defender (who had prepared to defend respondent) was hospitalized shortly before trial—was not prepared for trial, but his attorney told court that he was fully prepared. Morris v. Slappy, p. 1.

CONSTRUCTION INDUSTRY BARGAINING AGREEMENTS. See **National Labor Relations Act.**

CONTINUANCES. See **Constitutional Law,** V.

CONTRIBUTIONS OF EMPLOYER TO UNION TRUST FUNDS. See **Longshoremen's and Harbor Workers' Compensation Act,** 1.

COOPERATIVES. See **Constitutional Law,** I.

COURTS OF APPEALS. See **Elementary and Secondary Education Act of 1965.**

CRIMINAL LAW. See also **Constitutional Law,** II, 2; V; **Habeas Corpus; Probation; Stays,** 1, 3.

Reversal of federal convictions—Supervisory power.—In a federal prosecution for kidnaping, transporting women across state lines for immoral purposes, and conspiracy to commit such offenses, wherein respondents relied on inconsistent defenses of victims' consent and possibility that victims' identification of respondents was mistaken, Court of Appeals erred in reversing convictions apparently on basis of its supervisory power to discipline prosecutor for violating respondents' Fifth Amendment rights by argument to jury relating to respondents' failure to proffer evidence to rebut victims' testimony, regardless of whether prosecutor's argument constituted harmless error; record established that error was harmless beyond reasonable doubt. United States v. Hasting, p. 499.

CUSTODIAL STATEMENTS. See **Habeas Corpus.**

CUSTOMS LAWS. See **Constitutional Law,** II, 3.

DAMAGES. See **Civil Rights Act of 1871.**

DEATH BENEFITS. See **Longshoremen's and Harbor Workers' Compensation Act,** 1.

DEATH PENALTY. See **Stays,** 1, 3.

DELAY BY GOVERNMENT IN INSTITUTING FORFEITURE PROCEEDING. See **Constitutional Law,** II, 3.

DEPOSITIONS. See **Stays,** 2.

DISABILITY BENEFITS. See **Social Security Act.**

DISADVANTAGED CHILDREN'S EDUCATION. See **Elementary and Secondary Education Act of 1965.**

DISCRIMINATION BASED ON RACE. See **Internal Revenue Code,** 2.

DISCRIMINATION IN EDUCATION. See **Internal Revenue Code,** 2.

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964.**

DISTRICT ATTORNEYS. See **Constitutional Law,** IV, 3.

DISTRICT COURTS. See **Foreign Sovereign Immunities Act of 1976.**

DUE PROCESS. See **Constitutional Law,** II; **Internal Revenue Code,** 3; **Probation.**

EDUCATION AMENDMENTS OF 1978. See **Elementary and Secondary Education Act of 1965.**

EDUCATION OF DISADVANTAGED CHILDREN. See **Elementary and Secondary Education Act of 1965.**

ELECTRIC UTILITIES. See **Constitutional Law,** I; **Public Utility Regulatory Policies Act of 1978.**

ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.

Education of disadvantaged children—Federal grants to States—Recovery of misused funds.—Section 207(a)(1) of Act and § 415 of General Education Provisions Act, requiring that federal grants to States for improving disadvantaged children's educational opportunities take into account any overpayments or underpayments in previous grants, gave Government right to recover misused funds granted to a State, and imposition of liability for misused funds does not interfere with state sovereignty in violation of Tenth Amendment; initial determination of existence and amount of a State's liability is to be made by Department of Education, and State may seek judicial review of such determination in courts of appeals. Bell v. New Jersey, p. 773.

EMINENT DOMAIN. See **Quiet Title Act of 1972.**

EMPLOYEE TRUST FUNDS. See **National Labor Relations Act,** 1.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law,** IV, 3; **Longshoremen's and Harbor Workers' Compensation Act; Mootness; National Labor Relations Act.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964.**

EQUAL-FOOTING DOCTRINE. See **Quiet Title Act of 1972.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III; **Probation.**

FAIR MARKET VALUE. See **Internal Revenue Code,** 1.

FEDERAL ENERGY REGULATORY COMMISSION. See **Public Utility Regulatory Policies Act of 1978.**

FEDERAL GRANTS FOR EDUCATION OF DISADVANTAGED CHILDREN. See **Elementary and Secondary Education Act of 1965.**

FEDERAL INCOME TAXES. See **Constitutional Law,** III, 2; IV, 1; **Internal Revenue Code,** 1.

FEDERAL POWER ACT. See **Constitutional Law,** I; **Public Utility Regulatory Policies Act of 1978.**

FEDERAL RULES OF CIVIL PROCEDURE.

Amendments to Rules, p. 1095.

FEDERAL RULES OF CRIMINAL PROCEDURE.

Amendments to Rules, p. 1117.

FEDERAL-STATE RELATIONS. See **Atomic Energy Act of 1954; Constitutional Law,** I; **Elementary and Secondary Education Act of 1965; Internal Revenue Code,** 3; **Jurisdiction; National Labor Relations Act,** 2; **Quiet Title Act of 1972.**

FIFTH AMENDMENT. See **Constitutional Law,** II, 3; III, 2; **Criminal Law; Habeas Corpus; Internal Revenue Code,** 3; **Quiet Title Act of 1972.**

FINES. See **Probation.**

FIREFIGHTER LAYOFFS. See **Mootness.**

FIRST AMENDMENT. See **Constitutional Law,** IV; **Internal Revenue Code,** 2; **National Labor Relations Act,** 2.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976.

Federal jurisdiction—Foreign sovereign immunity.—Act, which grants jurisdiction to federal district courts in civil actions against foreign states with regard to *in personam* claims as to which foreign state is not entitled to immunity under certain other laws, generally codifies restrictive theory of foreign sovereign immunity whereby immunity is confined to suits involving sovereign's public, not commercial, acts, and does not limit juris-

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976—Continued.

diction to actions brought by American citizens; Congress did not exceed scope of Art. III by granting district courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where rule of decision may be provided by state law. Verlinden B. V. v. Central Bank of Nigeria, p. 480.

FORFEITURES. See **Constitutional Law,** II, 3.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II, 1; II, 2; III, 1; **Probation.**

FOURTH AMENDMENT. See **Habeas Corpus.**

FREEDOM OF RELIGION. See **Internal Revenue Code,** 2.

FREEDOM OF SPEECH. See **Constitutional Law,** IV.

GAIN OR LOSS FROM SALE OF PROPERTY. See **Internal Revenue Code,** 1.

GENERAL EDUCATION PROVISIONS ACT. See **Elementary and Secondary Education Act of 1965.**

GOVERNMENT EMPLOYEES. See **Constitutional Law,** IV, 3; **Mootness.**

HABEAS CORPUS.

State prisoner—Federal relief—Voluntariness of custodial statements.—Federal courts may not, on a state prisoner's habeas corpus petition, consider a claim that evidence obtained in violation of Fourth Amendment should have been excluded at his trial, when prisoner has had an opportunity for full and fair litigation of that claim in state courts; thus, Court of Appeals should not have considered Fourth Amendment issue but, on remand, should only review District Court's decision of Fifth Amendment issue concerning voluntariness of respondent's custodial statements admitted at state trial. Cardwell v. Taylor, p. 571.

HARBOR WORKERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

HAWAII. See **Constitutional Law,** II, 1.

HOMESTEAD RIGHTS AS AFFECTED BY TAX INDEBTEDNESS. See **Internal Revenue Code,** 3.

IDENTIFICATION REQUIRED OF LOITERERS. See **Constitutional Law,** II, 2.

IMMUNITY OF FOREIGN SOVEREIGN FROM SUIT. See **Foreign Sovereign Immunities Act of 1976.**

IMMUNITY OF UNITED STATES FROM SUIT. See **Quiet Title Act of 1972.**

INCOME TAXES. See **Constitutional Law,** III, 2; IV, 1; **Internal Revenue Code,** 1.

INCRIMINATING STATEMENTS. See **Habeas Corpus.**

INFRINGEMENT OF PATENTS. See **Patents.**

INTERCONNECTION OF ELECTRIC UTILITIES. See **Public Utility Regulatory Policies Act of 1978.**

INTEREST ON AWARD FOR PATENT INFRINGEMENT. See **Patents.**

INTERNAL REVENUE CODE. See also **Constitutional Law,** III, 2; IV, 1.

1. *Sale of property—Computation of gain or loss—Effect of nonrecourse obligation.*—Under § 1001 of Code, governing computation of gain or loss from sale of property, when a taxpayer disposes of property encumbered by a nonrecourse obligation exceeding fair market value of property, Commissioner of Internal Revenue may require him to include in "amount realized" outstanding amount of obligation; fair market value of property is irrelevant to this calculation. Commissioner v. Tufts, p. 300.

2. *Tax exemption—Private schools—Racial discrimination.*—Petitioners, private schools having racially discriminatory admissions policies, were properly denied tax-exempt status under § 501(c)(3) of Code, Government's interest in eradicating racial discrimination in education substantially outweighing whatever burden denial of tax benefits placed on petitioners' exercise of religious beliefs. Bob Jones University v. United States, p. 574.

3. *Tax indebtedness—Government's sale of taxpayer's home—Spouse's homestead interest.*—Section 7403 of Code grants power to a federal district court, in its discretion, to order sale of delinquent taxpayer's home itself, not just taxpayer's interest in property; if home is sold, nondelinquent spouse is entitled to so much of proceeds as represents complete compensation for loss of such spouse's separate homestead interest under state law. United States v. Rodgers, p. 677.

INTERSTATE COMMERCE. See **Constitutional Law,** I.

INTERSTATE TRANSFERS OF PRISONERS. See **Constitutional Law,** II, 1.

INTERSTATE TRAVEL. See **Constitutional Law,** III, 1.

JURISDICTION. See also **Elementary and Secondary Education Act of 1965; Foreign Sovereign Immunities Act of 1976.**

Federal courts—Injunctive relief—Police chokeholds.—Federal courts were without jurisdiction to entertain respondent's claim for injunctive relief against city to bar use of chokeholds by police in making arrests except

JURISDICTION—Continued.

when threatened by use of deadly force, since respondent—who allegedly had been choked when stopped for a traffic offense even though he offered no resistance—failed to demonstrate a case or controversy, there being no real and immediate threat that he would be subjected again to an illegal chokehold. Los Angeles v. Lyons, p. 95.

JUSTICIABILITY. See **Atomic Energy Act of 1954.**

LABOR MANAGEMENT RELATIONS ACT. See **National Labor Relations Act,** 1.

LAYOFFS OF MINORITY EMPLOYEES. See **Mootness.**

LIMITATION OF ACTIONS. See **Quiet Title Act of 1972.**

LOBBYING ACTIVITIES AS AFFECTING TAX-EXEMPT STATUS. See **Constitutional Law,** III, 2; IV, 1.

LOITERING. See **Constitutional Law,** II, 2.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. *Death benefits—"Wages"—Employer contributions to union trust funds.*—Employer contributions to union trust funds are not included in term "wages" as defined in § 2(13) of Act, and thus need not be included in "average weekly wage" for purposes of determining death benefits payable to deceased employee's widow. Morrison-Knudsen Construction Co. v. Director, OWCP, p. 624.

2. *Voluntary compensation payments—Assignment of employee's claims against third parties.*—An injured longshoreman's acceptance of voluntary compensation payments from employer did not constitute acceptance of compensation under an award in a "compensation order" so as to give rise to assignment to employer of longshoreman's claims against third parties under § 33(b) of Act. Pallas Shipping Agency, Ltd. v. Duris, p. 529.

MASSACHUSETTS. See **Mootness.**

MEDICAL-VOCATIONAL GUIDELINES FOR DETERMINING RIGHT TO DISABILITY BENEFITS. See **Social Security Act.**

MICHIGAN. See **Stays,** 2.

MOOTNESS.

Layoffs of policemen and firefighters—Federal-court orders—Subsequent state legislation.—Court of Appeals' judgment—upholding District Court's orders enjoining Boston Police and Fire Departments from laying off policemen and firemen in a manner that would reduce percentage of minority officers below level obtaining at commencement of layoffs—was vacated, and cases were remanded for consideration of mootness in light

MOOTNESS—Continued.

of Massachusetts' intervening enactment of legislation relating to layoffs. Firefighters v. Boston Chapter, NAACP, p. 477.

MORATORIUM ON CERTIFICATION OF NUCLEAR POWER-PLANTS. See **Atomic Energy Act of 1954.**

NATIONAL LABOR RELATIONS ACT.

1. *Construction industry—"Prehire" agreements—Employer contributions to employee trust funds.*—Monetary obligations assumed by a construction industry employer under a "prehire" contract authorized by § 8(f) of Act—such as petitioner's obligation as a signatory to a master labor agreement with a union to make contributions to fringe benefit trust funds on behalf of employees—may be recovered in an action under § 301 of Labor Management Relations Act brought by a union prior to employer's repudiation of contract, even though union had not obtained majority support in relevant employee unit. Jim McNeff, Inc. v. Todd, p. 260.

2. *Employee's union activities—Employer's state-court action against employee—Unfair labor practice.*—Where petitioner and co-owners of restaurant filed a state-court action against former employee and others for injunctive relief and damages based on defendants' picketing of restaurant and distributing of leaflets after former employee had filed unfair labor practice charges with National Labor Relations Board alleging that she had been fired because of her efforts to organize a union, Board may not enjoin prosecution of state-court action as an unfair labor practice unless action not only was in retaliation for employee's exercise of protected rights but also lacked a reasonable basis in fact or law; in determining whether a state-court suit lacks a reasonable basis, Board's inquiry must be structured so as to preserve state plaintiff's right to have a state-court jury or judge resolve genuine material factual or state-law legal disputes pertaining to lawsuit. Bill Johnson's Restaurants, Inc. v. NLRB, p. 731.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act,** 2.

NORTH DAKOTA. See **Quiet Title Act of 1972.**

NUCLEAR WASTE POLICY ACT OF 1982. See **Atomic Energy Act of 1954.**

PATENTS.

Infringement—Award of prejudgment interest.—Where District Court found patent infringement and determined what annual royalty payments would have been, court's award of prejudgment interest on each royalty payment from date it would have become due was proper under 35 U. S. C. § 284. General Motors Corp. v. Devex Corp., p. 648.

PICKETING AT SUPREME COURT. See **Constitutional Law,** IV, 2.

POLICE CHOKEHOLDS. See **Jurisdiction.**

POLICEMEN LAYOFFS. See **Mootness.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Atomic Energy Act of 1954; Constitutional Law,** I.

"PREHIRE" LABOR AGREEMENTS. See **National Labor Relations Act,** 1.

PREJUDGMENT INTEREST ON AWARD FOR PATENT INFRINGEMENT. See **Patents.**

PRISONS AND PRISONERS. See **Civil Rights Act of 1871; Constitutional Law,** II, 1.

PRIVATE SCHOOLS' RIGHT TO TAX-EXEMPT STATUS. See **Internal Revenue Code,** 2.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Habeas Corpus.**

PROBATION.

Revocation—Failure to pay fine and make restitution.—A sentencing court cannot properly revoke a defendant's probation and imprison him for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for his failure or that alternative forms of punishment were inadequate to meet State's interest in punishment and deterrence. Bearden v. Georgia, p. 660.

PROSECUTOR'S MISCONDUCT. See **Criminal Law.**

PUBLIC DEFENDER. See **Constitutional Law,** V.

PUBLIC EMPLOYEES. See **Constitutional Law,** IV, 3; **Mootness.**

PUBLIC SIDEWALKS AROUND SUPREME COURT. See **Constitutional Law,** IV, 2.

PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978.

Small electric power facilities—Rates and interconnections.—Federal Energy Regulatory Commission did not act arbitrarily in fixing rate to be paid by utilities in purchasing electric energy from cogeneration and small power facilities at maximum rate permissible under § 210(b) of Act; nor did Commission exceed its authority under § 210(a) in requiring utilities to make interconnections with cogenerators and small power facilities. American Paper Institute, Inc. v. American Electric Power Service Corp., p. 402.

PUNITIVE DAMAGES. See **Civil Rights Act of 1871.**

QUESTIONNAIRES. See **Constitutional Law,** IV, 3.

QUIET TITLE ACT OF 1972.

State's action against United States—Limitations period.—Act provides exclusive means by which adverse claimaints can challenge United States' title to real property, and Act's 12-year statute of limitations applies to a State as well as all others suing under Act; limitations period, as applicable to North Dakota's claim of title to certain portions of a riverbed, was not invalid under equal-footing doctrine, Tenth Amendment, or Fifth Amendment. Block v. North Dakota ex rel. Board of University and School Lands, p. 273.

RACIAL DISCRIMINATION. See **Internal Revenue Code,** 2.

RATES FOR ELECTRICITY. See **Constitutional Law,** I; **Public Utility Regulatory Policies Act of 1978.**

REFORMATORY GUARDS' LIABILITY FOR FAILURE TO PROTECT INMATES. See **Civil Rights Act of 1871.**

RELIGIOUS SCHOOLS' RIGHT TO TAX-EXEMPT STATUS. See **Internal Revenue Code,** 2.

RESIDENCE REQUIREMENT FOR SCHOOL ATTENDANCE. See **Constitutional Law,** III, 1.

RESTITUTION. See **Probation.**

RETALIATION BY EMPLOYER FOR EMPLOYEE'S UNION ACTIVITIES. See **National Labor Relations Act,** 2.

REVOCATION OF PROBATION FOR FAILURE TO PAY FINE OR MAKE RESTITUTION. See **Probation.**

RIGHT TO COUNSEL. See **Constitutional Law,** V.

RIGHT TO TRAVEL. See **Constitutional Law,** III, 1.

RURAL ELECTRIFICATION ACT. See **Constitutional Law,** I.

SALE OF HOMESTEAD FOR TAXES. See **Internal Revenue Code,** 3.

SCHOOLS. See **Constitutional Law,** III, 1; **Elementary and Secondary Education Act of 1965; Internal Revenue Code,** 2.

SEARCHES AND SEIZURES. See **Habeas Corpus.**

SELF-INCRIMINATION. See **Habeas Corpus.**

SENIORITY RIGHTS OF EMPLOYEES. See **Civil Rights Act of 1964.**

SIDEWALKS AROUND SUPREME COURT. See **Constitutional Law,** IV, 2.

SIXTH AMENDMENT. See **Constitutional Law,** V.

SOCIAL SECURITY ACT.

Disability benefits—Availability of jobs in national economy.—Under Act's provisions requiring that disability benefit claimaint must be unable to perform not only his former work but also any other gainful work in national economy for which he is qualified, Secretary of Health and Human Services' use of medical-vocational guidelines to determine whether jobs exist in national economy that claimaint can perform does not conflict with Act, nor are guidelines arbitrary or capricious. Heckler v. Campbell, p. 458.

SOVEREIGN IMMUNITY. See **Foreign Sovereign Immunities Act of 1976; Quiet Title Act of 1972.**

SPOUSES' RIGHTS IN HOMESTEAD. See **Internal Revenue Code,** 3.

STATES' MISUSE OF FEDERAL GRANTS FOR EDUCATION OF DISADVANTAGED CHILDREN. See **Elementary and Secondary Education Act of 1965.**

STATE SOVEREIGNTY. See **Elementary and Secondary Education Act of 1965.**

STATUTES OF LIMITATIONS. See **Quiet Title Act of 1972.**

STAYS.

1. *Death penalty.*—Application to stay execution of applicant's death sentence, pending disposition of his petition for certiorari to review Alabama Supreme Court's denial of his motion requesting a new sentencing hearing, is denied. Evans v. Alabama (POWELL, J., in chambers), p. 1301.

2. *State trial court order—Taking of depositions.*—Application to stay Michigan trial court's order in an action against applicant, a German corporation, directing taking of depositions of a number of applicant's employees who reside in Federal Republic of Germany, is granted pending Michigan Supreme Court's disposition of an application there to stay taking of depositions. Volkswagenwerk A. G. v. Falzon (O'CONNOR, J., in chambers), p. 1303.

3. *Vacation of stay of death sentence—Alabama sentencing procedures.*—Alabama's application to vacate Federal District Court's stay of respondent's death sentence is granted, since respondent's challenges to State's capital-sentencing procedures had been reviewed exhaustively by several state and federal courts and since there was no merit to new claim that trial court had construed in an unconstitutionally broad manner statutory aggravating factor as to respondent's having knowingly created a great risk of death to many persons. Alabama v. Evans, p. 230.

SUPREMACY CLAUSE. See **Atomic Energy Act of 1954; Constitutional Law,** I; **Internal Revenue Code,** 3.

SUPREME COURT. See also **Constitutional Law,** IV, 2.

1. Amendments to Federal Rules of Civil Procedure, p. 1095.

2. Amendments to Federal Rules of Criminal Procedure, p. 1117.

3. Bankruptcy Rules, p. 973.

4. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Ninth Circuit, p. 920.

TAXES. See **Constitutional Law,** III, 2; IV, 1; **Internal Revenue Code.**

TENTH AMENDMENT. See **Elementary and Secondary Education Act of 1965; Quiet Title Act of 1972.**

TEXAS. See **Constitutional Law,** III, 1; **Internal Revenue Code,** 3.

TRANSFERS OF PRISONERS. See **Constitutional Law,** II, 1.

UNFAIR LABOR PRACTICES. See **National Labor Relations Act,** 2.

UNIONS. See **National Labor Relations Act,** 1.

UNION TRUST FUNDS. See **Longshoremen's and Harbor Workers' Compensation Act,** 1.

UNITED STATES' IMMUNITY FROM SUIT. See **Quiet Title Act of 1972.**

VACATION OF STAYS. See **Stays,** 3.

VAGUENESS OF STATUTES. See **Constitutional Law,** II, 2.

VOLUNTARINESS OF INCRIMINATING STATEMENTS. See **Habeas Corpus.**

VOLUNTARY COMPENSATION PAYMENTS. See **Longshoremen's and Harbor Workers' Compensation Act,** 2.

"WAGES" AS INCLUDING EMPLOYER CONTRIBUTIONS TO UNION TRUST FUNDS. See **Longshoremen's and Harbor Workers' Compensation Act,** 1.

WELFARE BENEFITS. See **Social Security Act.**

WHOLESALE RATES FOR ELECTRICITY. See **Constitutional Law,** I.

WORDS AND PHRASES.

1. "*Amount realized.*" § 1001, Internal Revenue Code of 1954, 26 U. S. C. § 1001. Commissioner v. Tufts, p. 300.

2. "*Compensation order.*" § 33(b), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 933(b). Pallas Shipping Agency, Ltd. v. Duris, p. 529.

WORDS AND PHRASES—Continued.

3. "*Wages*." § 2(13), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902(13). Morrison-Knudsen Construction Co. v. Director, OWCP, p. 624.

WORKERS' COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act.**